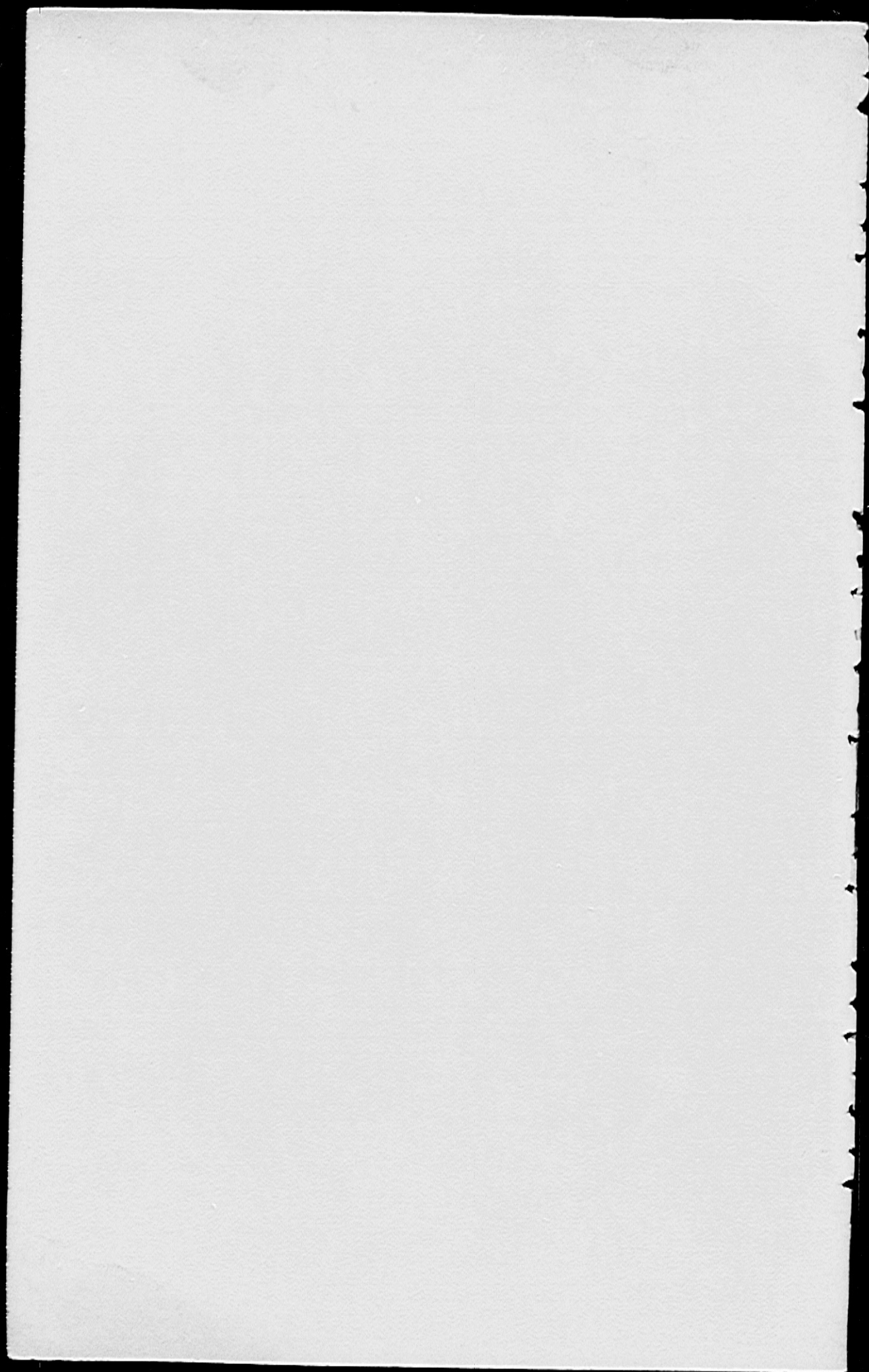


***United States Court of Appeals
for the
District of Columbia Circuit***



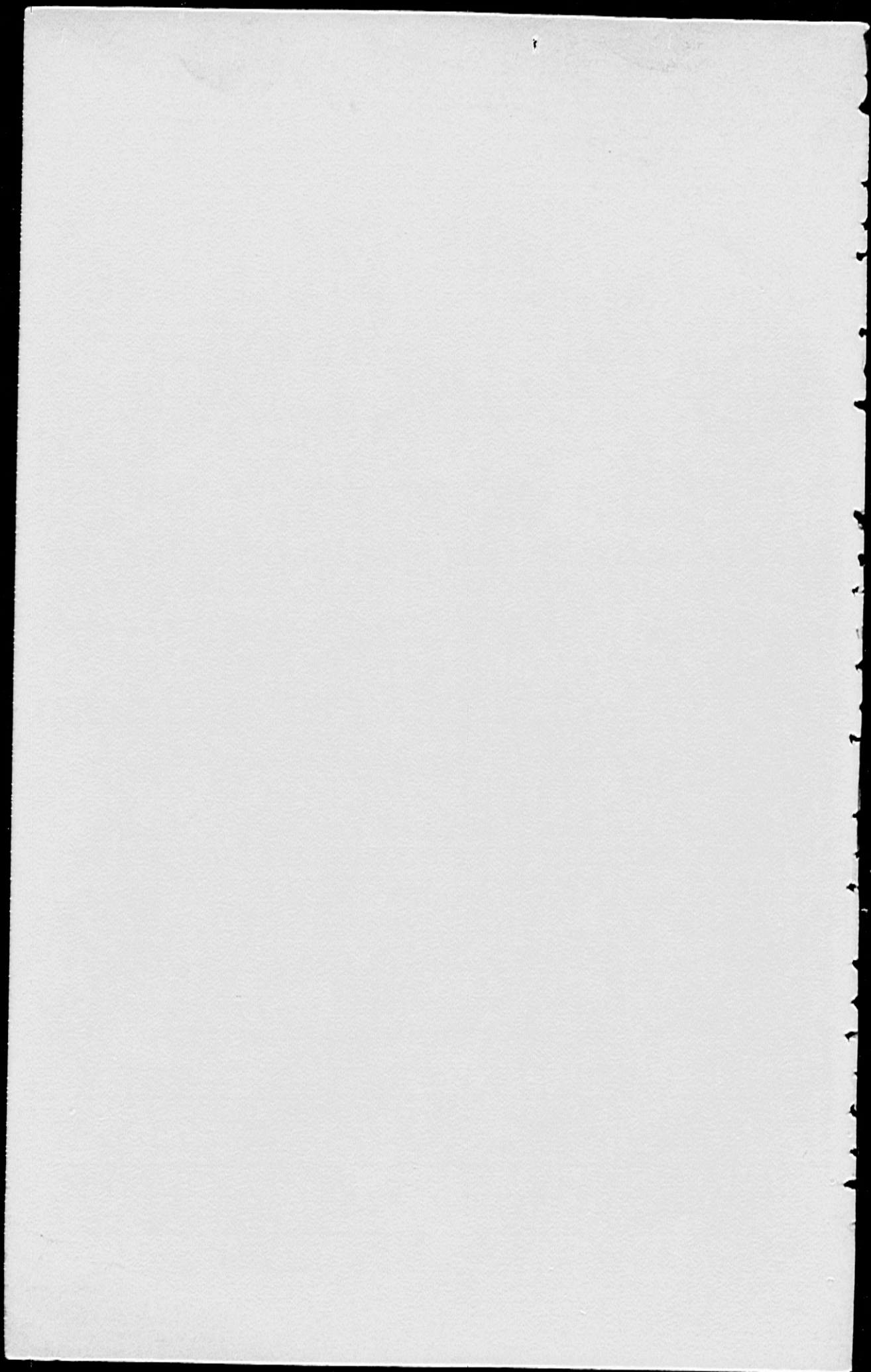
**TRANSCRIPT OF
RECORD**



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR and THE RIGGS NATIONAL BANK OF
WASHINGTON, D. C., as Executors of the Estate of
CHARLES DELMAR, Deceased, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From Order and Judgment of the United States
District Court

JOINT APPENDIX

Civil Docket

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1966

Oct. 3 Complaint, appearance. filed

Oct. 3 Summons, copies (2) and copies (2) of Complaint issued

Dec. 6 Motion of plaintiffs for summary judgment; statement; exhibit A with exhibits 1 thru 7; exhibit B with exhibits 1 and 2; memorandum, ser. ack. 12/6/66; M.C. 12/6/66. filed

Dec. 7 Summons, copies (2) and copies (2) of complaint issued. Deft. ser. 12-8-66 Atty. Gen. ser. 12-19-66

1967

Jan. 11 Stipulation of counsel extending time for deft. to respond to motion for summary judgment to and including 2-15-67. filed

Feb. 8 Cross-motion of deft. to dismiss for lack of jurisdiction; memorandum; P&A; c/m 2-2; M.C. 2-8. filed

Feb. 9 Withdrawal of deft.'s cross-motion to dismiss per counsel. filed

Feb. 16 Opposition of deft. to plttf.'s motion for summary judgment; cross-motion for summary judgment; statement; P&A; c/m 2-15; appearance of Mitchell Rogovin, Stanley F. Krysa and Joseph H. Thibodeau. filed

Feb. 20 Opposition of plttf. to cross-motion of deft.; c/m 2-20. filed

Feb. 20 Answer of deft. to complaint; c/m 2-16; appearance of Mitchell Rogovin, Myron C. Baum and Joseph H. Thibodeau. filed

Feb. 20 Calendared (N) AC/N.

- Mar. 7 Order denying and overruling pltffs.' motion for summary judgment; granting deft.'s motion for summary judgment and dismissing action with prejudice. (N) Matthews, J.
- Mar. 9 Transcript of proceedings 3-1-67. (Rep.: J. Blair—Court's copy) filed
- Mar. 20 Transcript of proceedings 3-3-67; Part I. (Rep.: J. Blair—Court's copy) filed
- May 2 Notice of appeal by pltffs. from order of 3-7-67; copy mailed to Joseph H. Thibodeau. Deposit by Brown \$5.00 filed
- May 3 Order granting pltffs. leave to deposit \$250.00, with Clerk, by bank cashier's checks, in lieu to bond for costs on appeal. (N) Jones, J.
- May 4 Deposit of \$250.00 by pltffs. into the Court in lieu of appeal bond per order of 5-3-67.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action, File No. 2603—'66

Complaint

(For Refund of Federal Estate Tax)

ROLAND H. DEL MAR (address: The Harbour Square Apartments, Apt. No. S231, 500 N. Street, S. W., Washington, D. C.) and THE RIGGS NATIONAL BANK OF WASHINGTON, D. C. (address: 800 17th Street, N. W., Washington, D. C. 20013), as Executors of the ESTATE OF CHARLES DELMAR, Deceased, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

1. This is a suit of a civil nature arising under the laws of the United States, including the laws providing for Internal Revenue, and including particularly the provisions of Title 28, United States Code section 1346(a)(1), as amended (28 U.S.C.A. section 1346(a)(1)).

2. Plaintiffs, Roland H. del Mar and The Riggs National Bank of Washington, D. C., are executors of the Last Will and Testament of Charles Delmar, Deceased. The Riggs National Bank of Washington, D. C. is a banking corporation organized and existing under the Federal Banking Laws with full authority to act as executor of wills and in other trust capacities.

3. Charles Delmar died August 17, 1963, a resident of Washington, District of Columbia, leaving a Last Will and Testament which was duly admitted to probate in the United States District Court for the District of Columbia, holding a probate court, to which jurisdiction in that behalf belonged. On September 11, 1963, letters testamentary were duly issued out of that Court to Ellsworth C. Alvord and The Riggs National Bank of Washington, D. C., who duly qualified as executors of said Last Will and Testament. On January 20, 1964, letters testamentary were duly

issued out of that Court to Roland H. del Mar as substitute executor in the place and stead of Ellsworth C. Alvord, deceased, and Roland H. del Mar duly qualified as an executor of the said Last Will and Testament. Since January 20, 1964, Roland H. del Mar and The Riggs National Bank of Washington, D. C. have been and still are duly qualified and acting as such executors.

4. Within six months after the will of the decedent was admitted to probate and on November 1, 1963, the surviving spouse, Jacqueline Delmar, acting under Section 18-211, Title 18, of the District of Columbia Code (1961 edition), filed with the Probate Court a written renunciation renouncing all claims to any and all devises and bequests made to her under the will and electing to receive her legal share of the real and personal property of the estate. At the time of the decedent's death, he owned real estate located in the State of Maryland. The surviving spouse also renounced the decedent's will in the ancillary administration effected in that State for the distribution of said real estate.

5. The plaintiffs have a just claim against the defendant for the sum of \$355,942.82, or such greater sum as results from the decision of the Court herein, together with interest as provided by law, which said sum was paid by the said executors of the Estate of Charles Delmar, Deceased, to the defendant through the duly appointed, qualified and acting District Director of Internal Revenue for the District of Maryland, as hereinafter set forth.

6. Within the time allowed by law, to wit, on November 16, 1964, plaintiffs filed with the said District Director of Internal Revenue a final estate tax return covering the Federal estate taxes assessable against the Estate of Charles Delmar, having previously filed the preliminary return required by law, and, on that date, paid the estate tax liability shown on the final return in the amount of \$1,969,231.36.

7. In said Federal estate tax return filed, the amount of the marital deduction claimed (\$1,725,725.58) was determined on the theory that the widow's share, though less than one-half of the adjusted gross estate, was subject to and must be reduced by a part of the Federal and District of Columbia estate tax. On the same theory, the office of the said District Director of Internal Revenue, in making the adjustments hereinafter referred to in paragraph 9, fixed the amount of the allowable marital deduction at \$1,726,620.96.

8. On June 24, 1965, plaintiffs, by mail, duly filed with the said District Director of Internal Revenue a claim for refund dated June 24, 1965 on the basis that the amount otherwise constituting the allowable marital deduction under Title 26, United States Code section 2056, as amended (26 U.S.C.A. section 2056), should not be reduced by either of such taxes.

9. Thereafter, the examining agent, reviewing said final return, made adjustments increasing the reported value of certain assets and reducing certain deductions claimed for administration expenses, none of which are in controversy herein, refused to otherwise increase the amount of the allowable marital deduction, as claimed, and determined that a deficiency existed in the amount of \$7,015.29, together with statutory interest thereon from the final date on which said tax return was due amounting to \$701.53, and the aggregate amount of \$7,716.82 was paid to the said District Director of Internal Revenue on August 25, 1966 covering this requirement. Also by nonregistered letter dated February 4, 1966 the said District Director tentatively proposed for disallowance plaintiffs' claim for refund.

10. This Complaint is filed before the expiration of two (2) years from the date of mailing of the said tentative notice of disallowance.

11. Based upon the grounds set forth in said claim for refund and the facts therein reflected, all of which are incor-

porated herein by reference, plaintiffs overpaid the Federal estate tax due in the amount of \$355,942.82, or such greater sum as should result from an appropriate decision of this Court.

12. The repayment of the amount of the claimed refund has been demanded but no part of said sum has been credited, remitted, refunded or repaid in any manner to the plaintiffs; and the full amount thereof, together with interest thereon, remains due and owing from the defendant to the plaintiffs.

WHEREFORE, plaintiffs demand judgment against defendant in the principal amount of \$355,942.82, or such greater sum as results from the decision of the Court herein, together with interest thereon as provided by law, from the dates of payment thereof, and all costs of this proceeding.

/s/ HARRY L. BROWN

Harry L. Brown

Counsel for Plaintiffs

200 World Center Building

Washington, D. C. 20006

Of Counsel:

ALVORD AND ALVORD

200 World Center Building

Washington, D. C. 20006

BRACKLEY SHAW, Esquire

SHAW, PITTMAN, POTTS, TROWBRIDGE & MADDEN

910 17th Street, N. W.

Washington, D. C. 20006

District of Columbia) ss.

Roland H. del Mar, being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that he verily believes the facts stated in the Complaint to be true.

/s/ ROLAND H. DEL MAR
Roland H. del Mar

Subscribed and sworn to before me this 27th day of September, 1966.

/s/ FRANCES B. HALL
Notary Public

My Commission Expires Feb. 14, 1970

District of Columbia) ss.

Edwin B. Shaw, being first duly sworn, deposes and says: I am a Vice President of The Riggs National Bank of Washington, D. C., one of the plaintiffs in the above-entitled action; I make this affidavit in behalf of that corporation; I have read the foregoing Complaint and know the contents thereof, and I verily believe the facts stated in the Complaint to be true.

/s/ EDWIN B. SHAW
Edwin B. Shaw

Subscribed and sworn to before me this 20th day of September, 1966.

/s/ ELIZABETH S. WILLIAMSON
Notary Public

My Commission Expires Feb. 28, 1968

[HEADING OMITTED]

Answer

The defendant, the United States of America, by its attorney, David G. Bress, Esquire, United States Attorney for the District of Columbia, for its answer to the complaint herein alleges as follows:

1. Admits the allegations contained in paragraph 1.
2. Admits the allegations contained in paragraph 2.
3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3.
4. Admits the allegations contained in the first sentence of paragraph 4. Denies knowledge or information sufficient to form a belief as to the truth of all other allegations contained in paragraph 4.
5. Admits the allegations contained in paragraph 5, except denies that plaintiffs have any just claim against the defendant for any amount.
6. Admits the allegations contained in paragraph 6.
7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7, except alleges that the District Director's determination speaks for itself.
8. Admits the allegations contained in paragraph 8, except denies each and every allegation contained in plaintiff's claim for refund.
9. Admits the allegations contained in paragraph 9.
10. Admits the allegations contained in paragraph 10.
11. Denies the allegations contained in paragraph 11.
12. Admits the allegations contained in paragraph 12, except denies that any amount remains due and owing from defendant to the plaintiffs.

WHEREFORE, defendant prays that judgment be entered in its favor, dismissing plaintiffs' complaint, allowing defendant its costs and such other and further relief as this Court may deem just and proper.

MITCHELL ROGOVIN
Mitchell Rogovin
*Assistant United States
Attorney General*

MYRON C. BAUM
Myron C. Baum
*Chief, Refund Trial
Section No. 2*

JOSEPH H. THIBODEAU
Joseph H. Thibodeau
*Attorneys, Tax Division
Department of Justice
Washington, D. C. 20530
Attorneys for Defendant*

Of Counsel:

/s/ DAVID G. BRESS
David G. Bress
United States Attorney

[HEADING OMITTED]

Motion for Summary Judgment

Plaintiffs, as executors of the Estate of Charles Delmar, Deceased, by their attorney, hereby move the Court to enter summary judgment for the plaintiffs in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, determinative of the issue whether the surviving spouse of a District of Columbia decedent, having filed a written renunciation under Section 18-211,

Title 18, of the District of Columbia Code (1961), takes her statutory share of the estate free of any Federal or District of Columbia estate tax.

In support hereof, plaintiffs rely upon the pleadings herein, the affidavit hereto attached and marked Exhibit A, Exhibits 1, 2, 3, 4, 5, 6 and 7 attached thereto, and the affidavit hereto attached and marked Exhibit B, Exhibits 1 and 2 attached thereto, all of which show that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

Plaintiffs further request that the Court, in entering its Order pursuant to this Motion, state therein, pursuant to 28 U.S.C.A. section 1292(b), that the Order involves the controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order will materially advance the ultimate termination of the litigation.

Respectfully submitted,

/s/ HARRY L. BROWN
Harry L. Brown
Counsel for Plaintiffs
200 World Center Building
Washington, D. C. 20006

Of Counsel:

ALVORD AND ALVORD
200 World Center Building
Washington, D. C. 20006

BRACKLEY SHAW, Esquire
SHAW, PITTMAN, POTTS, TROWBRIDGE & MADDEN
910 17th Street, N. W.
Washington, D. C. 20006

[HEADING OMITTED]

**Defendant's Opposition to Plaintiffs' Motion for Summary
Judgment and Cross-Motion for Summary Judgment**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9 of the rules of this Court, the defendant, the United States of America, respectfully opposes plaintiffs' motion for summary judgment and submits that it should be denied for the reasons set forth in its memorandum of points and authorities filed herewith.

Defendant further moves the Court to grant summary judgment in its favor on the grounds that there is no dispute as to any material fact involved in this controversy, and that the defendant is entitled to judgment as a matter of law.

In support of its cross-motion for summary judgment, the defendant relies on its statement of material facts as to which there is no genuine issue and the memorandum of points and authorities in support of its motion, both of which are filed herewith.

MITCHELL ROGOVIN
Mitchell Rogovin
Assistant Attorney General

STANLEY F. KRYSA
Stanley F. Krysa
*Acting Chief, Refund Trial
Section No. 2*

JOSEPH H. THIBODEAU
Joseph H. Thibodeau
*Attorney
Tax Division
Department of Justice
Washington, D. C. 20530
Attorneys for Defendant*

Of Counsel:

.....
DAVID G. BRESS
United States Attorney

[HEADING OMITTED]

Order and Judgment

The Court, having carefully considered the respective motions for summary judgment filed on behalf of each of the parties hereto, together with the briefs, pleadings, and oral arguments of counsel relating thereto, being of the opinion that the plaintiffs' motion should be overruled and that the defendant's motion should be granted, it is accordingly

ORDERED, ADJUDGED and DECREED by the Court that the plaintiffs' motion for summary judgment be and the same is hereby overruled and denied.

It is further ORDERED, ADJUDGED and DECREED by the Court that the defendant's motion for summary judgment be and the same hereby is granted and that this action is hereby dismissed with prejudice.

DONE this 7th day of March, 1967.

.....
United States District Judge

[HEADING OMITTED]

Notice of Appeal

NOTICE is hereby given that Roland H. del Mar and The Riggs National Bank of Washington, D. C., as Executors of the Estate of Charles Delmar, Deceased, the Plaintiffs above named, hereby appeal to the United States Court of Appeals for the District of Columbia from the Order and Judgment denying Plaintiffs' Motion for Summary Judgment and granting Defendant's Motion for Summary

Judgment and dismissing the action with prejudice entered in this action on March 7, 1967.

Dated: May 2, 1967.

HARRY L. BROWN

Harry L. Brown

Attorney for Appellants

Roland H. del Mar and
The Riggs National Bank
of Washington, D. C.

[HEADING OMITTED]

**Plaintiffs' Statement of Material Facts as to Which There
Should Be No Genuine Issue**

This statement is made under Rule 9(h) of the Rules of this Court and in support of a Motion for Summary Judgment in a suit for the recovery of an asserted overpayment of Federal estate tax heretofore made to defendant by plaintiffs.

Charles Delmar died August 17, 1963 a resident of Washington, District of Columbia, leaving a Last Will and Testament and a First and Second Codicil thereto, all of which were duly admitted to probate in the United States District Court for the District of Columbia, holding a probate court, to which jurisdiction in that behalf belonged.

The date of death value, before death taxes, of the probate estate for distribution (plus real estate) amounted to \$7,627,073.30.

On September 11, 1963, letters testamentary were duly issued out of the said District Court to Ellsworth C. Alvord and The Riggs National Bank of Washington, D. C. who duly qualified as executors of said Last Will and Testament. On January 20, 1964, letters testamentary were duly issued out of that Court to Roland H. del Mar as substitute

executor in the place and stead of Ellsworth C. Alvord, Deceased, and Roland H. del Mar duly qualified as an executor of the said Last Will and Testament. Since January 20, 1964, Roland H. del Mar and The Riggs National Bank of Washington, D. C. have been and still are duly qualified and acting as such executors.

Under the terms of the Will of Charles Delmar, Deceased, there was bequeathed and devised to his surviving spouse, Jacqueline Delmar, the land and building constituting their home at the time of his death, together with the furniture and fixtures located therein. The Will further provided that there should be placed in trust for her exclusive benefit an amount which, when added to the foregoing, would be equal to one-third of the sum of (a) all personal property distributable by his executors under the Will and (b) all real property owned by him at the time of his death. Specific bequests aggregating the amount of \$38,750.00 were left to various named legatees; the sum of \$1,000,000 was left to The Charles Delmar Foundation, a recognized charitable organization; and the residue of the estate was left to Roland H. del Mar, son of the decedent.

Paragraph (14) of the Will provided that the executors should pay out of the "residuary estate," without right of reimbursement, all estate, inheritance and succession taxes.

Within six months after the Will of the decedent was admitted to probate, and on November 1, 1963, the surviving spouse, Jacqueline Delmar, acting under Section 18-211, Title 18, of the District of Columbia Code (1961 edition), filed with the said District Court a written renunciation renouncing all claims to any and all devises and bequests made to her under the Will and electing to receive her legal share of the real and personal property of the estate.

Within the time allowed by law, to wit, on November 16, 1964, plaintiffs filed with the District Director of Internal

Revenue for the District of Maryland a final estate tax return covering the Federal estate taxes assessable against the Estate of Charles Delmar, Deceased, having previously filed the preliminary return required by law, and, on that date, paid the estate tax liability shown on the final return in the amount of \$1,969,231.36.

In said Federal Estate Tax Return filed, the amount of the claimed marital deduction (\$1,725,725.58) under section 2056, Internal Revenue Code of 1954, was determined on the theory that the share of the surviving spouse, though less than one-half of the adjusted gross estate, was subject to and must be reduced by a part of the Federal and District of Columbia estate taxes. On the same theory, the Office of the District Director of Internal Revenue, on examination of the said return, though making other adjustments not here in controversy, fixed the amount of the allowable marital deduction at \$1,726,620.96.

On June 24, 1965, plaintiffs, by mail, duly filed with the said District Director of Internal Revenue a claim for refund dated June 24, 1965 on the basis that the amount otherwise constituting the allowable marital deduction should not be reduced by either the Federal or the District of Columbia estate tax. By nonregistered letter dated February 4, 1966, the said District Director tentatively proposed for disallowance plaintiffs' claim for refund.

Plaintiffs also filed on or about November 17, 1964 with the Finance Office, Revenue Division, Inheritance and Estate Tax Section, of the District of Columbia, a protective claim for refund of part of the District of Columbia estate tax which had been paid. Therein it requested that action on the claim be held in abeyance until such time as the merits of the Federal claim had been determined. This the Government of the District of Columbia agreed to do.

The Riggs National Bank of Washington, D. C., as executor of the Estate of Charles Delmar, Deceased, made the following payments of inheritance and estate taxes (and

interest) to the following jurisdictions on the following dates:

State of Maryland Inheritance Tax

Jacqueline Delmar	(12/12/64)	\$	292.37
Roland H. del Mar	(12/12/64)		584.75
			<hr/>
		\$	877.12

District of Columbia Inheritance Tax

Jacqueline Delmar	(11/12/64)	\$	76,691.34
Roland H. del Mar	(11/12/64)		117,920.18
Other Legatees	(11/12/64)		425.00
			<hr/>
			\$195,036.52

District of Columbia Estate Tax

Original	(1/15/65)	\$	180,644.49
Deficiency	(8/ 8/66)		1,516.81
			<hr/>
		\$	182,161.30

Federal Estate Tax

Original	(11/16/64)	\$1,969,231.36
Deficiency	(8/22/66)	7,015.29
		<hr/>
Total Tax		\$1,976,246.65
Interest	(8/22/66)	701.53

Were there no marital deduction provided for in the Federal estate tax law, the surviving spouse, Jacqueline Delmar, would have been liable for a Maryland inheritance tax in the amount of \$292.37; for a District of Columbia inheritance tax in the amount of \$61,460.63; for a District of Columbia estate tax in the amount of \$145,751.16; and for a Federal estate tax in the amount of \$977,584.28—for a total of \$1,185,088.44. Under the terms of the Will, the residuary estate would have been liable for the balance of the Maryland and District of Columbia inheritance taxes and the District of Columbia and Federal estate taxes aggregating \$2,335,214.67.

Under the Government's theory on which the amount of the allowable marital deduction should be determined, the

surviving spouse, Jacqueline Delmar, is liable for a Maryland inheritance tax in the amount of \$292.37; for a District of Columbia inheritance tax in the amount of \$76,691.34; for a District of Columbia estate tax in the amount of \$60,720.43; and for a Federal estate tax in the amount of \$658,748.88—for a total of \$796,453.02. Under the terms of the Will, the residuary estate is liable for the balance of the Maryland and District of Columbia inheritance taxes and the District of Columbia and Federal estate taxes which would aggregate \$1,557,868.58.

Under plaintiffs' theory on which the amount of the allowable marital deduction should be determined, the surviving spouse, Jacqueline Delmar, would be liable for a Maryland inheritance tax in the amount of \$292.37; for a District of Columbia inheritance tax in the amount of \$109,081.58; and to no District of Columbia or Federal estate tax—for a total of \$109,373.95. Under the terms of the Will, the residuary estate would be liable for the balance of the Maryland and District of Columbia inheritance taxes and for all of the District of Columbia and Federal estate taxes aggregating \$1,812,044.22.

The claim for refund involved herein was timely filed.

Respectfully submitted,

/s/ HARRY L. BROWN

Harry L. Brown

Counsel for Plaintiffs

200 World Center Building

Washington, D. C. 20006

Of Counsel:

ALVORD AND ALVORD

200 World Center Building

Washington, D. C. 20006

BBackley Shaw, *Esquire*

SHAW, PITTMAN, POTTS, TROWBRIDGE & MADDEN

910 17th Street, N. W.

Washington, D. C. 20006

EXHIBIT B**Affidavit of Shirley T. Moore in Support of Plaintiffs' Motion
for Summary Judgment**

DISTRICT OF COLUMBIA SS.

Shirley T. Moore, being first duly sworn, deposes and states:

(1)(a) That I am a certified public accountant duly licensed under the laws of the State of Maryland and possessed of a certification under the laws of the District of Columbia, and have followed the accounting profession for approximately 16 years, presently maintaining offices at 918-16th Street, N. W., Washington, D. C. and 8801 Colesville Road, Silver Spring, Maryland.

(b) That this affidavit, based on personal knowledge, is submitted in support of the plaintiffs' Motion for Summary Judgment herein, for the purpose of showing, in addition to the allegations contained in the Complaint filed by the Executors of the Estate of Charles Delmar, Deceased, in Civil Action, File No. 2603-66, in the United States District Court for the District of Columbia, which may stand admitted, that there is in this action no genuine issue as to any material fact, and that the plaintiffs are entitled to judgment as a matter of law.

(2) That for years I have been active in the preparation of tax returns; that I was active in the preparation of the Federal Estate Tax Return for the Estate of Charles Delmar; and that I am familiar with that return as filed and with the adjustments made thereto both by the examining agent and a conferee of the Internal Revenue Service.

(3) That at the request of Harry L. Brown, Esq., counsel for the said Estate of Charles Delmar, Deceased, I have prepared Exhibits 1 and 2, attached hereto and made a part hereof.

(4) That Exhibit 1, with respect to the Estate of Charles Delmar, Deceased, sets forth, in a 3-column comparison, the Maryland inheritance tax, the District of Columbia inheritance and estate taxes, and the Federal estate tax which would result with respect to the gross taxable estate (as adjusted) if under the Federal Internal Revenue Code of 1954 (1) no marital deduction, otherwise provided for in section 2056, were allowable, (2) after giving effect to the marital deduction provided for in that section in the amount determined by the Internal Revenue Service as being proper, and (3) after giving effect to such marital deduction in an amount asserted to be proper in the Complaint filed in the foregoing action. There is also set forth in said Exhibit 1 a comparison of the death tax reduction arising from the allowance of a marital deduction which results from the Internal Revenue Service determination of the proper amount of that deduction and from the amount asserted in the said Complaint to represent the proper marital deduction.

(5) That in said Exhibit 1, the tax reduction to the wife (representing the excess of column (1) over column (3)) results solely from the imposition of no estate tax on her share of the estate; the resulting tax reduction for the son (the excess of column (1) over column (3)) arises only incidentally and from the fact that the resulting taxable estate is subjected to a lower progressive tax rate.

(6) That Exhibit 2 is a 3-column comparison, with respect to the said Estate of Charles Delmar, Deceased, of the after-tax distributable probate estate (1) were no marital deduction allowable for Federal estate tax purposes, (2) were the marital deduction computed by the Internal Revenue Service the properly allowable amount of that deduction, and (3) were the properly allowable

marital deduction in the amount asserted in the aforesaid Complaint.

FURTHER DEPONENT SAYETH NOT.

/s/ SHIRLEY T. MOORE
Shirley T. Moore

Subscribed and sworn to before me this 1st day of December, 1966.

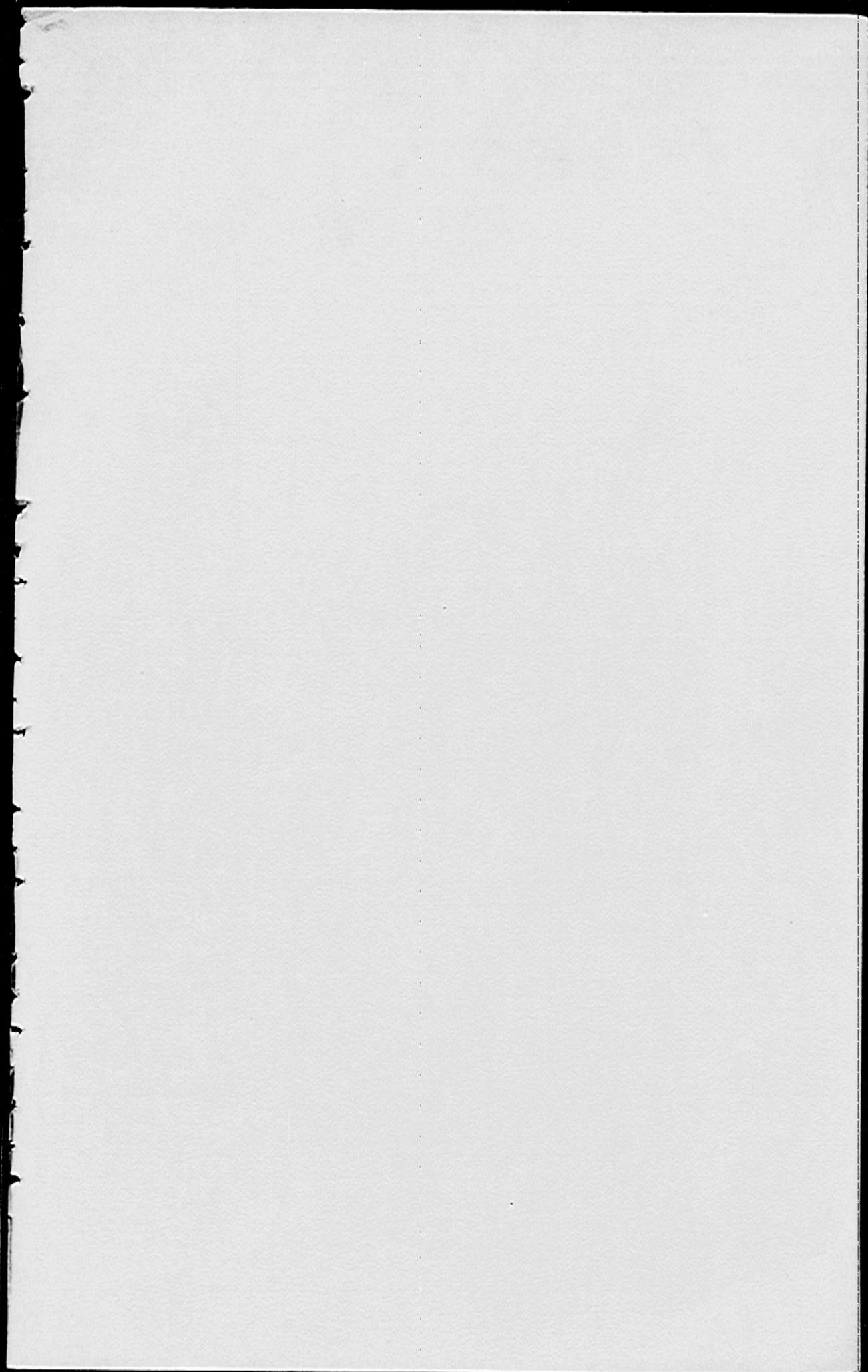
My Commission Expires Feb. 14, 1970

/s/ FRANCES B. HALL
Notary Public

/s/ HARRY L. BROWN
Harry L. Brown
Counsel for Plaintiffs
200 World Center Building
Washington, D. C. 20006

ESTATE OF CHARLES DELMAR
Tax Liabilities and Their Distribution

	(1) No Marital Deduction	(2) Allowed Marital Deduction	(3) Claimed Marital Deduction
Gross Taxable Estate (as adjusted)	\$8,275,302.10		
Less:			
Administration expenses, etc.	\$ 669,440.51		
Charitable deduction	1,000,000.00		
Specific exemption	60,000.00	1,729,440.51	
Net Taxable Estate before Marital Deduction	\$6,545,861.59	\$6,545,861.59	\$6,545,861.59
(1) No Marital Deduction			
(2) Allowed Marital Deduction		1,726,620.96	
(3) Claimed Marital Deduction			2,413,769.26
Taxable Estate	\$6,545,861.59	\$4,819,240.63	\$4,132,092.33
Gross Federal Estate Tax	3,520,303.11	2,354,321.60	1,921,418.17
Less: Section 2011 Credit	587,550.28	378,074.95	301,114.34
Net Federal Estate Tax	2,932,752.83	1,976,246.65	1,620,303.83
Maryland Inheritance Tax:			
Wife	292.37	292.37	292.37
Son (Estate)	584.76	584.76	584.76
Total	877.13	877.13	877.13
D. C. Inheritance Tax:			
Wife	61,460.63	76,691.34	109,081.58
Son (Estate)	87,958.99	118,345.18	104,271.11
Total	149,419.62	195,036.52	213,352.69
D. C. Estate Tax:			
Wife	145,751.16	60,720.43	
Son (Estate)	291,502.37	121,440.87	86,884.52
Total	437,253.53	182,161.30	86,884.52
Total Maryland and D. C. Tax:			
Wife	207,504.16	137,704.14	109,373.95
Son (Estate)	380,046.12	240,370.81	191,740.39
Total	587,550.28	378,074.95	301,114.34
Federal Estate Tax:			
Wife	977,584.28	658,748.88	
Son (Estate)	1,955,168.55	1,317,497.77	1,620,303.83
Total	2,932,752.83	1,976,246.65	1,620,303.83
Federal, Maryland and D. C. Tax:			
Wife	1,185,088.44	796,453.02	109,373.95
Son (Estate)	2,335,214.67	1,557,868.58	1,812,044.22
Total	\$3,520,303.11	\$2,354,321.60	\$1,921,418.17
Tax Reduction:			
(2) over (1):			
Wife		388,635.42	
Son (Estate)		777,346.09	
Total		\$1,165,981.51	
(3) over (1):			
Wife			1,075,714.49
Son (Estate)			523,170.45
Total			\$1,598,884.94



ESTATE OF CHARLES DELMAR

Probate Estate for Distribution:

- (1) No Marital Deduction
 (2) Allowed Marital Deduction
 (3) Claimed Marital Deduction

Gross estate—Federal tax purposes		\$8,275,302.10
Add: Security value write-down for tax purposes under Section 2032 "alternate valuation"		57,643.65
Probate Valuation		\$8,332,945.75
Less:		
Administration expense, debts, etc.	\$ 669,440.51	
Non-probate assets	36,431.94	705,872.45
Probate estate before tax		\$7,627,073.30

DISTRIBUTION UNDER

	(1) No Marital Deduction	(2) Allowed Marital Deduction	(3) Claimed Marital Deduction
Probate estate before tax	\$7,627,073.30	\$7,627,073.30	\$7,627,073.30
Less:			
Md. and D. C. tax	\$ 587,550.28	\$ 378,047.95	\$ 301,114.34
Federal estate tax	2,932,752.83	1,976,246.65	1,620,303.83
	3,520,303.11	2,354,321.60	1,921,418.17
Balance	\$4,106,770.19	\$5,272,751.70	\$5,705,655.13
DISTRIBUTION:			
Named individual legatees	38,750.00	38,750.00	38,750.00
Charity	1,000,000.00	1,000,000.00	1,000,000.00
Wife:			
Gross	2,542,357.76	2,542,357.76	2,542,357.76
Less tax	1,185,088.44	796,453.02	109,373.95
Net	1,357,269.32	1,745,904.74	2,432,983.81
Son (Estate):			
Gross	4,045,965.54	4,045,965.54	4,045,965.54
Less tax	2,335,214.67	1,557,868.58	1,812,044.22
Net	1,710,750.87	2,488,096.96	2,233,921.32
Total distribution after tax	\$4,106,770.19	\$5,272,751.70	\$5,705,655.13
Increase in distribution			
(2) over (1)			
Wife		\$ 388,635.42	
Son (Estate)		777,346.09	
Total		\$1,165,981.51	
(3) over (1)			
Wife			\$1,075,714.49
Son (Estate)			523,170.45
Total			\$1,598,884.94

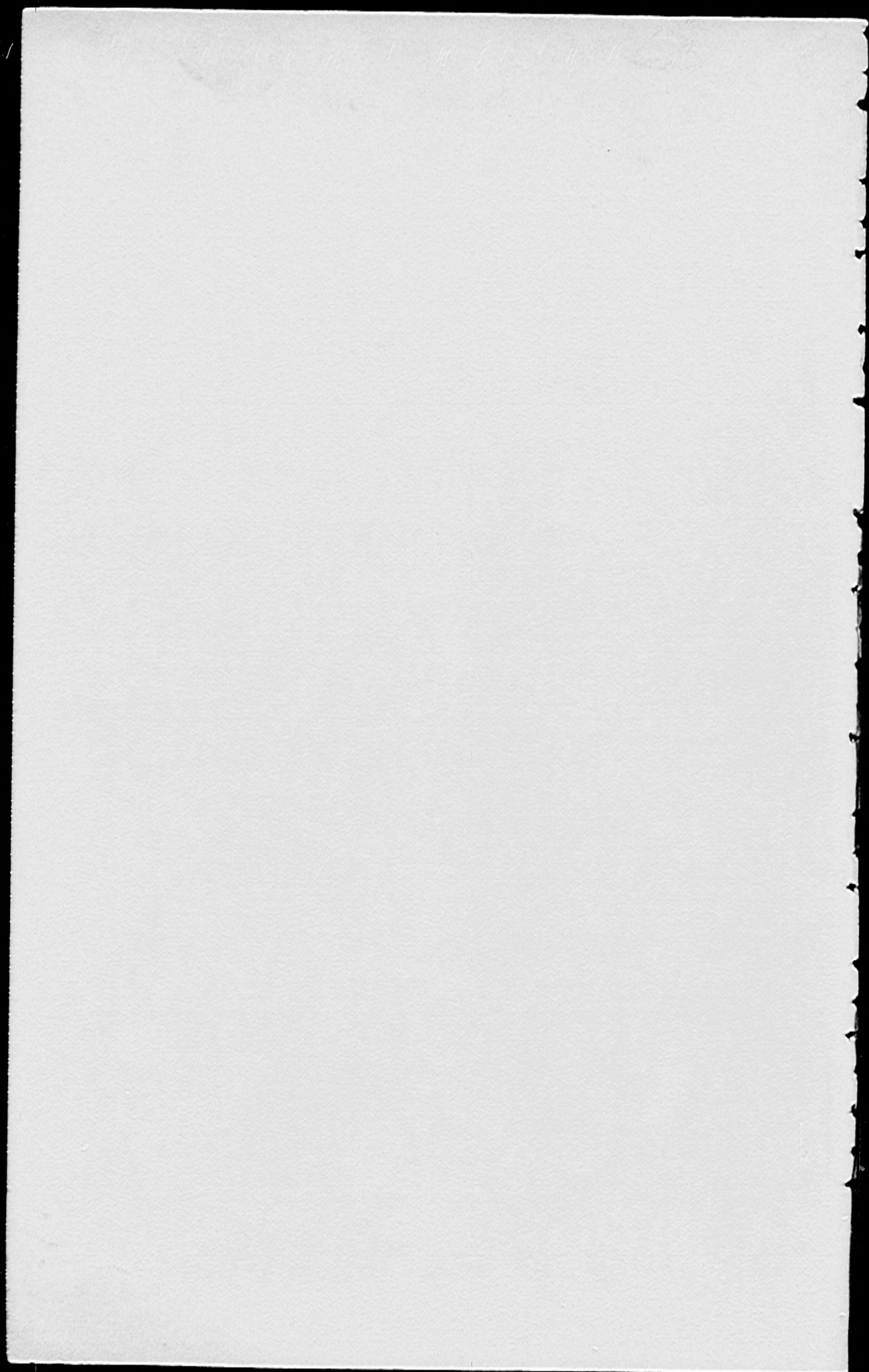


EXHIBIT A

[Heading Omitted]

**Affidavit of Edwin B. Shaw in Support of Plaintiffs' Motion
for Summary Judgment**

DISTRICT OF COLUMBIA) SS.

Edwin B. Shaw, being first duly sworn, deposes and states:

(1)(a) That I am a Vice President of The Riggs National Bank of Washington, D. C., one of the plaintiffs in Civil Action, File No. 2603-66, before the United States District Court for the District of Columbia.

(b) That this affidavit, based on personal knowledge, is submitted in support of the Plaintiffs' Motion for Summary Judgment herein, for the purpose of showing, in addition to the allegations contained in the Complaint which may stand admitted, that there is in this action no genuine issue as to any material fact, and that the plaintiffs are entitled to judgment as a matter of law.

* * *

(11) That as an Executor of the Estate of Charles Delmar, The Riggs National Bank of Washington, D. C. made the following payments of inheritance and estate taxes to the following Governments on the following dates and in the following amounts (including interest where so identified):

State of Maryland Inheritance Tax

Jacqueline Delmar	(12/12/64)	\$	292.37
Roland H. del Mar	(12/12/64)		584.75
		\$	877.12

District of Columbia Inheritance Tax

Jacqueline Delmar	(11/12/64)	\$	76,691.34
Roland H. del Mar	(11/12/64)		117,920.18
Other Legatees	(11/12/64)		425.00
		\$	195,036.52

District of Columbia Estate Tax

Original	(1/15/65)	\$ 180,644.49
Deficiency	(8/ 8/66)	1,516.81
		<hr/>
		\$ 182,161.30

Federal Estate Tax

Original	(11/16/64)	\$1,969,231.36
Deficiency	(8/22/66)	7,015.29
		<hr/>
Total Tax		\$1,976,246.65
Interest	(8/22/66)	701.53

* * *

[Heading Omitted]

**Defendant's Statement of Material Facts as to Which There Is
No Genuine Issue of Fact and Denial of Plaintiffs' State-
ment of Material Facts as to Which There Should Be No
Genuine Issue**

Pursuant to Rule 9(h) of the Rules of this Court, defendant herewith contests all facts contained in plaintiffs' statement of material facts, except those contained and alleged by defendant herein as being without any genuine issue. Defendant further contends that the facts stated herein as to which there is no genuine issue provide a sufficient basis upon which this Court may grant summary judgment in defendant's favor.

1. Plaintiffs seek recovery of taxes paid on the estate of Charles F. Delmar, who died a resident of Washington, District of Columbia, on August 17, 1963.

2. Plaintiffs are residents of Washington, District of Columbia.

3. Plaintiffs are the co-executors of the above-mentioned estate and, in such capacity, filed the Federal estate tax return on or about November 16, 1964, paying the tax shown thereon to be due.

4. Plaintiffs' Federal estate tax return claimed the amount of \$1,725,725.88 as a deduction under Section 2056

of the Internal Revenue Code of 1954, otherwise known as the "marital deduction".

5. Upon examination by the District Director of Internal Revenue, the amount of the marital deduction allowance was increased to \$1,727,174.73.

6. Pursuant to Section 18-211, Title 18, of the District of Columbia Code (1961 Edition), the decedent's surviving spouse, Jacqueline Delmar, renounced all claims to any and all devises and bequests made to her under the Will of Charles F. Delmar.

7. Decedent's said surviving spouse thereby received a statutory share of decedent's estate equivalent to that share which she would have received had decedent died intestate.

8. On June 24, 1965, plaintiffs filed with the District Director of Internal Revenue a Claim for Refund (Form 843), seeking the recovery of taxes paid on the estate of Charles F. Delmar.

9. Plaintiffs' complaint has been timely filed and requests relief on the same grounds as were presented in its claim for refund.

10. True and correct copies of the following documents are attached as Exhibit A to plaintiffs' Motion for Summary Judgment:

(a) The Last Will and Testament of Charles F. Delmar, with the first and second codicils thereto.

(b) The Federal Estate Tax Return (Form 706) for the estate of Charles F. Delmar.

(c) Documents computing, and notifying the plaintiffs of, the determination by the Internal Revenue Service of the Federal estate tax liability on the estate of Charles F. Delmar.

(d) Plaintiffs' Claim for Refund (Form 843).

(e) The Renunciation of Devises and Bequests in the estate of Charles F. Delmar, executed in November, 1963, by his surviving spouse, Jacqueline Delmar.

11. Defendant avers that each of the foregoing documents speaks for itself and that these documents, when taken in conjunction with the foregoing statements and the pleadings herein, afford sufficient basis upon which this Court may grant a Summary Judgment in its favor.

* * *

Last Will and Testament of Charles Delmar

(1) I, Charles Delmar, now residing at 3130 "P" Street, N. W., Washington, D. C., being of sound and disposing mind and memory, do hereby make, publish and declare this to be my last will and testament, and I do hereby revoke any and all other wills, codicils, or testaments by me at any time heretofore made.

(2) I direct my executors to pay all my just debts, funeral expenses, and expenses of administration as soon after my death as conveniently may be done. I authorize and direct my executors to pay whatever sum is necessary to provide me with such funeral as is considered appropriate by my wife, Jacqueline Delmar, without regard to any limitation placed thereon by law, and I further authorize and direct my executors to pay any reasonable sum for a burial lot and monument adequate for me, to be selected by my said wife.

(3) I give, bequeath, and devise to my wife, Jacqueline Delmar, her heirs and assigns, the land and buildings constituting our home in the District of Columbia at the time of my death, whether such home shall be at 3130 "P" Street, N. W. where it is now located or at any other address in the District of Columbia. I also give and bequeath to my said wife all of the furniture, fixtures, and

other tangible personal property located therein at the time of my death, except such part thereof as elsewhere in this will I have expressly bequeathed to my son, Roland Haddaway Delmar. The term "tangible personal property" used herein shall not be deemed to include any money, securities, bank accounts, or similar investment properties.

(4) I give and bequeath to my trustees so much of my personal property as, when increased by the real and personal property devised and bequeathed to my wife, Jacqueline Delmar, by Paragraph (3) hereof, may be equal to one-third of the sum of (a) all personal property distributable by my executors under this will, after the payment of all funeral expenses, expenses of administration of my estate, and debts of my estate (including all estate and inheritance taxes payable by my executors under Paragraph (14) hereof), and (b) all real property owned by me at the time of my death. For the purpose of the preceding sentence, real property shall be valued as of the date of my death, and personal property as of the date of distribution thereof by my executors. This bequest is payable in cash or in securities or partly in cash and partly in securities as my executors in their sole discretion shall determine, provided that any property or interests in property used, or the proceeds of which are used, for the payment of this bequest shall be such as may qualify for the marital deduction under the Federal estate tax laws. The amount so paid to my trustees shall be held by them in trust upon the following terms and conditions:

(i) To pay the entire net income thereof in quarterly or more frequent installments to my wife, Jacqueline Delmar.

(ii) This trust shall terminate—

(a) At the time my wife, Jacqueline Delmar, attains the age of fifty (50) years; or

(b) Such earlier date as my trustees shall in their sole discretion deem advisable.

(iii) Upon termination the entire principal shall be distributed to my said wife or to her estate free of the trust.

* * *

(14) My executors shall pay out of my residuary estate (without any right of reimbursement) all estate, inheritance, and succession taxes, and all other governmental charges which may be assessed against any gift made by me under this will, and which may be determined to be due against any property transferred by me in trust during my lifetime and against all property owned by me and any other person as tenants by the entirety or as joint tenants with right of survivorship and passing at the time of my death to such surviving tenants by reason of such ownership, and any such taxes or other governmental charges as shall be assessed against any insurance issued on my life payable to named beneficiaries, whether in a lump sum or in trust or permitted to remain in the hands of the insurance company on optional settlement. It is my intention that all property passing under this will, except that passing as my residuary estate, and all property transferred by me in trust during my lifetime, and all property passing at my death to a survivor by reasons of ownership as tenants by the entirety or joint tenants with right of survivorship, and the proceeds of all life insurance payable to a named beneficiary whether in a lump sum, in trust, or under an option of settlement, shall pass undiminished by any such taxes or other governmental charges.

* * *

IN WITNESS WHEREOF, I have hereunto set my hand and seal to this my Last Will and Testament, written on sixteen (16) sheets of paper, each sheet signed at the end thereof, this 12th day of December, 1957, in the presence of the undersigned.

* * *

First Codicil to Last Will and Testament of Charles Delmar

I, Charles Delmar, now residing at 3130 "P" Street N. W., Washington, D. C., declare this to be a First Codicil to my Last Will and Testament which I executed on December 12, 1957.

. . .

(2) I direct that the provisions appearing in my Will as subparagraphs (i), (ii) and (iii) of Paragraph (4) shall be stricken, and that in their place and stead the following shall be substituted:

"(i) The entire net income of this trust shall be paid in quarterly or more frequent installments to my wife, Jacqueline Delmar, throughout her lifetime.

"(ii) Upon her death, or at any time during her life but only after she has attained the age of fifty (50) years, the entire corpus of the trust, including any income which may not have been previously distributed, shall be paid over, free of this trust, to such person or persons (including my said wife, her estate, her creditors, or the creditors of her estate), in such portions, and upon such trusts, conditions, or limitations, as my said wife shall appoint."

(3) The interest of any beneficiary in principal or income of any trust under my Will shall not be subject to assignment, alienation, pledge, attachment, or to the claims of creditors of such beneficiary.

. . .

Second Codicil to Last Will and Testament of Charles Delmar

I, Charles Delmar, now residing at 3130 "P" Street, N. W., Washington, D. C., declare this to be a Second Codicil to my Last Will and Testament which I executed on December 12, 1957, and the First Codicil which I executed on October 31, 1958.

* * *

(3) Except as hereinbefore stated, I expressly confirm my said Last Will and Testament which I executed on December 12, 1957 and the First Codicil which I executed on October 31, 1958.

* * *

Estate Tax Return

GROSS ESTATE

SCHEDULE A

REAL ESTATE

Did the decedent, at the time of his death, own any real estate in the United States? ☒ Yes ☐ No

Item No.	Description	Subsequent valuation date	Alternate value	Value at date of death
1	Lot 829 in Square 1256, improved by premises 3130 "P" Street, N. W., Washington, D. C. (sold 7/17/64. Net Proceeds)	7/17/64	\$109,604.00	\$109,604.00
2	Tract of land with improvements known as "Oakland" containing approximately 80 acres. Tract of unimproved land containing approximately 40 acres. Both tracts located in Petersville Election District, Frederic County, Maryland. Appraisal Attached	8/17/64	79,300.00	79,300.00
3	Unimproved lots 18, 19, 20, 21, 22, 23, 24 and 25 in Block 26, Villa Site addition to Homosassa, Florida, Township 19 South Range 17 East. Recorded, Citrus County, Florida, Book 26, Page 18	8/17/64	600.00	600.00
TOTAL (also enter under the Recapitulation, Schedule O)			\$189,504.00	\$189,504.00

ESTATE OF CHARLES DELMAR

Page 7

SCHEDULE B

STOCKS AND BONDS

1. Did the decedent, if a resident or citizen of the United States, own any stocks or bonds, regardless of physical location at the time of his death? ☒ Yes ☐ No

2. Did the decedent, if a nonresident not a citizen of the United States, own, at the time of his death, any stocks of corporations organized in the United States or bonds situated in the United States as explained in the instructions?

☐ Yes ☐ No

Item No.	Description (including face amount of bonds or number of shares)	Alternate value	Value at date of death
1	Stocks	\$7,349,923.79	\$7,407,344.79
	Bonds	51,990.17	52,212.82
	See Schedule Attached which includes accrued interest and dividends de- clared as of record prior to August 17, 1963 payable subsequent.		
	TOTAL	\$7,401,913.96	\$7,459,557.61
	(also enter under the Recapitulation, Schedule O)		

ESTATE OF CHARLES DELMAR

Page 9

SCHEDULE C

MORTGAGES, NOTES, AND CASH

Did the decedent, at the time of his death, own any mortgages, notes, or cash? ☒ Yes ☐ No

Item No.	Description	Subsequent valuation date	Alternate value	Value at date of death
1	American Security and Trust Company, Washington, D. C. *	8/17/64	\$ 46,336.26	\$ 46,336.26
2	The Riggs National Bank of Washington, D. C. *	8/17/64	462,591.14	462,591.14
3	The National Savings and Trust Company, Washington, D. C. *	8/17/64	10,131.15	10,131.15
4	National Bank of Washington, Washington, D. C. *	8/17/64	52,134.18	52,134.18
5	The Chase Manhattan Bank, New York, N. Y. *	8/17/64	55,919.57	55,919.57
6	Note, Joe Z. James, dated September 7, 1962, principal amount \$7,000.00 at 6%, payable at \$50.00 per month. Principal balance at date of death \$6,250.00	8/17/64	6,250.00	6,250.00
7	Accrued interest as at 8/17/63	8/17/64	92.89	92.89
	* Checking account			
	TOTAL		\$633,455.19	\$633,455.19
	(also enter under the Recapitulation, Schedule O)			

ESTATE OF CHARLES DELMAR

Page 11

SCHEDULE D

INSURANCE

1a. Was any insurance on life of decedent receivable by his estate? ☒ Yes ☐ No

1b. By beneficiaries other than estate? ☒ Yes ☐ No

2. Was there any insurance on the decedent's life which is not included in the return as a part of the gross estate? ☒ Yes ☐ No

If "Yes," a complete explanation as to all such insurance must be submitted.

Item No.	Description	Subsequent valuation date	Alternate value	Value at date of death
	Massachusetts Mutual Life Insurance Co.:			
1	Policy No. 1275 440 Beneficiary— Mareen D. Braddock	Sept. '63	\$10,000.00	\$10,000.00
2	Policy No. 1 409 293 Beneficiary— Mareen D. Braddock	Sept. '63	10,000.00	10,000.00
3	Policy No. 1 320 707 Beneficiaries— Mareen D. Braddock and Roland Haddaway del Mar	Sept. '63	15,000.00	15,000.00
4	Policy No. 594 793 Beneficiary—Estate of Charles F. Delmar	8/18/64	204.00	204.00

NOTE:

Massachusetts Mutual Life Insurance Policies Nos. 1, 491 064 and 1, 271 654 each in face amount of \$50,000.00 on life of decedent owned by State Loan and Finance Corporation, 1200 - 18th Street, N. W., Washington, D. C.

Forms 712 attached

TOTAL	\$35,204.00	\$35,204.00
(also enter under the Re- capitulation, Schedule O)		

ESTATE OF CHARLES DELMAR

Page 13

SCHEDULE M

BEQUESTS, ETC., TO SURVIVING SPOUSE (MARITAL DEDUCTION)

If the decedent died testate, the person or persons filing the return should answer the following questions. Only question 4 should be answered in case the decedent died intestate. If the answer to any question is "Yes," full details should be submitted with the return.

1. Has any action been instituted to contest the will or any provision thereof affecting any property interest listed on this schedule or for construction of the will or any such provision? ☐ Yes ☐ No

2a. Had the surviving spouse the right to declare an election between (i) the provisions made in his or her favor by the will and (ii) dower, curtesy, or a statutory interest? ☒ Yes ☐ No

2b. If answer to question 2a is "Yes," has the surviving spouse renounced the will and elected to take dower, curtesy, or a statutory interest? ☒ Yes ☐ No

2c. Elected to take under the will. ☐ Yes ☒ No

2d. Does the surviving spouse contemplate renouncing the will and electing to take dower, curtesy, or a statutory interest? ☐ Yes ☐ No

3. According to the information and belief of the person or persons filing the return, is any action described under question 1 designed or contemplated? ☐ Yes ☐ No

4. According to the information and belief of such person or persons, has any person other than the surviving spouse asserted (or is any such assertion contemplated) a right

to any property interest listed on this schedule, other than as indicated under questions 1 or 3? ☐ Yes ☒ No

Item No.	Description of property interests passing to surviving spouse	Value
1	Statutory one third ($\frac{1}{3}$) of Real and Personal property	\$2,518,830.41
	TOTAL	\$2,518,830.41
	Less: (a) Federal estate tax payable out of above-listed property interests	\$656,410.45
	(b) Other death taxes payable out of above-listed property interests	136,694.38
	Total of items (a) and (b)	793,104.83
	Net value of above-listed property interests (also enter under the Recapitulation Schedule O)	\$1,725,725.58

ESTATE OF CHARLES DELMAR

Page 29

SCHEDULE O

RECAPITULATION

Schedule	Gross estate	Alternate value	Value at date of death
A	Real estate	\$ 189,504.00	\$ 189,504.00
B	Stocks and bonds	7,401,913.96	7,459,557.61
C	Mortgages, notes, and cash	633,455.19	633,455.19
D	Insurance	35,204.00	35,204.00
E	Jointly owned property	NONE	NONE
F	Other miscellaneous property	11,516.35	11,516.35
G	Transfers during decedent's life ..	NONE	NONE
H	Powers of appointment	NONE	NONE
I	Annuities	NONE	NONE
	TOTAL GROSS ESTATE	\$8,271,593.50	\$8,329,237.15

Sched- ule	Deductions	Amount
J	1. Funeral expenses and expenses incurred in administering property subject to claims	\$ 347,213.15
K	2. Debts of decedent	302,957.17
K	3. Mortgages and liens	30,000.00
	4. Total of items 1 through 3	<u>\$ 680,170.32</u>
	5. Allowable amount of deductions from item 4 (see note*)	\$ 680,170.32
L	6. Net losses during administration	NONE
L	7. Expenses incurred in administering property not subject to claims	NONE
	8. Total of items 5 through 7	\$ 680,170.32
M	9. Bequests, etc., to surviving spouse—Marital deduction	\$1,725,725.58
	10. Adjusted gross estate (see note**)	7,591,423.18
	11. Net amount deductible for bequests, etc., to surviving spouse (item 9 or one-half of item 10, whichever is smaller)	1,725,725.58
N	12. Charitable, public, and similar gifts and bequests	1,000,000.00
	TOTAL ALLOWABLE DEDUCTIONS, except specific exemption (totals of lines 8, 11, and 12)	<u>\$3,405,895.90</u>

* Note.—See paragraph 1 of the instructions.

** Note.—Enter at item 10 the excess of "TOTAL GROSS ESTATE" over item 8, if the decedent and his surviving spouse at no time held property as community property. If property was ever held as community property, compute the "Adjusted gross estate" (item 10) in accordance with the instructions and example on page 32, and attach an additional sheet showing such computation.

ESTATE OF CHARLES DELMAR

PROOF OF FEDERAL ESTATE TAX

Gross Estate		\$8,271,593.50
Debts and Claims	\$ 680,170.32	
Insurance	35,000.00	
Dividends	1,431.94	716,602.26
		<hr/>
Probate Estate for Distribution		\$7,554,991.24
		<hr/>
Wife's 1/3rd share on election		\$2,518,330.41
Widow's Allowance		500.00
		<hr/>
Gross to Widow for Marital Deduction		\$2,518,830.41
Less taxes:		
1/3rd Federal estate tax	\$ 656,410.45	
Wife's D. C. inheritance tax	77,531.73	
1/3rd D. C. estate tax	59,162.65	793,104.83
		<hr/>
Marital Deduction		\$1,725,725.58
		<hr/>
Gross Estate		\$8,271,593.50
Debts and Claims	\$ 680,170.32	
Marital Deduction	1,725,725.58	
Exemption	60,000.00	
Charitable Bequests	1,000,000.00	3,465,895.90
		<hr/>
Taxable Estate		\$4,805,697.60
		<hr/>
Gross Tax		\$2,345,789.49
Credit State Death Tax		376,558.13
		<hr/>
Net Federal Estate Tax		\$1,969,231.36
		<hr/>

Explanation of Changes to Deductions

Schedule M—Marital Deduction

Net Amount Deductible	\$1,725,725.58	\$1,727,174.73
Increase	1,449.15	

The marital deduction has been adjusted as follows:

Wife's share of residue:

Adjusted gross estate returned		\$7,591,423.18
Changes: Schedule B	\$ 7,262.19	
Schedule J	11,119.15	
Schedule K	(389.34)	+ 17,992.00

Adjusted gross estate, corrected		\$7,609,415.18
Less: Insurance	\$35,000.00	
Dividends on insurance	1,338.06	— 36,338.06

		\$7,573,077.12
Less: Administration expenses claimed in Fiduciary Return		— 1,805.65

		\$7,571,271.47
Less: D.C. Estate Tax	\$ 182,497.28	
Federal Estate Tax	1,977,800.54	2,160,297.82

Residue		\$5,410,973.65
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Wife's share of residue (1/3)		\$1,803,657.88
Plus: Widow's allowance		+ 500.00

		\$1,804,157.88
Less: D.C. Inheritance Tax		76,983.71

Corrected marital deduction		\$1,727,174.17
-----------------------------	--	----------------

(Difference of \$.56 is due to rounding of decimals)

Remarks:

The claim for refund in the amount of \$367,998.58 filed on June 25, 1965, with respect to the above estate has been disallowed. Decedent's spouse's share of the estate is to be computed after deduction of Federal and District of Columbia estate taxes. *Herson v. Mills*, Dist. Ct. D.C., 221 Fed. Supp. 714 (1963).

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

C L A I M

Form 843
(Rev. Mar. 1960)

District Director's Stamp
(Date Received)

To be filed with the District Director where
Assessment was made or tax paid

The District Director will indicate in the block below the
kind of claim filed, and fill in where required.

- ☒ Refund of Taxes Illegally, Erroneously, or
Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used
in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate,
gift, or income taxes.)

Please Type or Print Plainly

Name of taxpayer or purchaser of stamps Estate of
Charles Delmar
Number and street The Riggs National Bank of Wash-
ington, D. C.
City, town, postal zone, State 800 17th Street, N. W.
Washington, D. C. (Att'n E. B. Shaw)

Fill in applicable items—Attach letter size sheets
if space is not sufficient

1. Social security number
2. If an employer, enter employer identification number
3. District in which return (if any) was filed Maryland
4. Name and address shown on return, if different from
above
5. Period—if for tax reported on annual basis, prepare
separate form for each taxable year
From , 19 , To 19
6. Kind of tax Estate

7. Amount of assessment \$1,969,231.36
Dates of payment November 16, 1964
8. Date stamps were purchased from Government
9. Amount to be refunded \$367,998.58 plus*
10. Amount to be abated (not applicable to income, estate, or gift taxes)
11. The claimant believes that this claim should be allowed for the following reasons:
See Attachment.

*or such greater or lesser sum as may result from proper application of the law to the basis of the claim.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed ROLAND H. DEL MAR

The Riggs National Bank of Washington, D. C., by its Vice President

E. B. SHAW, *Co-executors*

Dated June 24, 1965.

ATTACHMENT

In the Federal estate tax return filed by the Estate of Charles Delmar on or about November 16, 1964, there was claimed as a marital deduction the amount to which the surviving spouse was entitled under Section 18-211, District of Columbia Code (1964)—she having renounced all claim to any and all devises and bequests made to her by the Will of her deceased husband.

In calculating the amount of the deduction, otherwise in the amount of \$2,518,830.41, it was reduced by Federal estate tax in the amount of \$656,410.45, District of Columbia estate tax in the amount of \$59,162.65, and District of Columbia inheritance tax in the amount of \$77,531.73.

Accordingly, the marital deduction claimed was in the amount of \$1,725,725.58.

This claim is basically predicated upon the allowability of a marital deduction in the amount of \$2,436,147.54. It is asserted that such amount should not be reduced for either the Federal or District of Columbia estate tax.

Claim is also made for such overpayment of tax as may result from the allowance as a deduction of legal costs arising from successful prosecution of the principal claim.

The Executors filing this claim filed the return involved and are still acting in their fiduciary capacity.

June 24, 1965

Finance Office
Revenue Division
Inheritance and Estate Tax Section
Municipal Center
Washington 1, D. C.

Re: *Estate of Charles Delmar, Deceased*

Gentlemen:

On or about November 17, 1964, the undersigned executors filed with your office an inheritance tax return and, with respect to the shares of the Estate of the above-entitled individual to be received by Jacqueline Delmar and Roland H. del Mar, paid inheritance tax in the respective amounts of \$76,691.34 and \$118,345.18. Thereafter, District of Columbia estate tax in the amount of \$180,644.49 was assessed and paid.

In the Federal estate tax return filed, the amount of property passing to Jacqueline Delmar, surviving spouse of the decedent, was, for purposes of the marital deduction allowance provided for in the Internal Revenue Code of 1954, reduced by a proportionate part of the Federal and

District of Columbia estate taxes deemed attributable to her share. Concurrently herewith the executors of this Estate are filing a claim for refund of Federal estate tax based primarily upon the proposition that the amount allowable for marital deduction purposes is not to be so reduced, together with such refund as may arise from legal costs incurred in the successful prosecution of the refund claimed.

It is anticipated that litigation will be required to reach a final determination of the Federal refund claimed. Any final determination favorable to the Estate will automatically give rise to a refund of District of Columbia estate tax. Parenthetically, it will be noted that such would also slightly increase the District of Columbia inheritance taxes above noted.

Claim for refund is hereby made for any reduction in District of Columbia estate tax arising from the allowance of the Federal refund claim filed. It is requested, however, that action on this claim be held in abeyance until such time as the Internal Revenue Service or the courts have passed upon the merits of the Federal claim.

Respectfully submitted,

ROLAND H. DEL MAR

The Riggs National Bank of
Washington, D. C.

By E. B. SHAW
Vice President

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding Probate Court

Administration No. 109449

In re Estate of CHARLES DELMAR, Deceased.

Renunciation of Devises and Bequests

I, Jacqueline Delmar, widow of Charles Delmar, late of the City of Washington, District of Columbia, deceased, do hereby renounce and quit all claim to any devise or bequest made to me by the last Will of my husband exhibited and proved according to law; and I elect to take in lieu thereof my legal share of the real and personal property of my said spouse.

Dated the 1st day of November, 1963

JACQUELINE DELMAR
Jacqueline Delmar
(Mrs. Charles F. Delmar)

DISTRICT OF COLUMBIA) ss:

Personally appeared before me this 1st day of November, 1963, Jacqueline Delmar, being personally well known to me as the person who executed the foregoing and annexed renunciation and election bearing date on the 1st day of November, 1963, and acknowledged the same to be her act and deed.

JUDITH C. HUSE
Notary Public
District of Columbia

My Commission Expires May 31, 1967

FILED
Nov. 7, 1963
Theodore Cogswell
Register of Wills, DC
Clerk of the Probate Court
(SEAL)

* * *

Mr. Brown: In conclusion, Your Honor, I would like to note that while in my Points and Authorities I cite a substantial number of Law Review Articles on the subject generally, there just came to my attention an article which is captioned or entitled:

"The Federal Estate Tax Burden borne by
a Decedent's Widow"

and it appears in the 1964 Michigan Law Review at page 1499 which is now in the June 1966 edition and this is, to my knowledge, the only law review devoted entirely to this particular point. I would call Your Honor's attention to the fact that that article was written by Professor Douglas A. Kahn who was counsel for the plaintiff in the case of *Herson v. Mills*, but the article is very exhaustive.

23 Of course, Your Honor, it is an article which favors my view, but it is nevertheless a very exhaustive one, giving the pros and cons.

I commend it to the Court as being an excellent exposition of the subject.

The Court: Well, now, that was a very earnest young man.

Mr. Brown: Yes.

The Court: And there was definitely opposition in that case.

Mr. Brown: Yes—well, one of my former law partners, who is now on the Joint Committee on Internal Revenue Taxation, knows Mr. Kahn and his brother also, who is District Attorney of Internal Revenue in Atlanta, and he called to my attention this article, because he said that Douglas Kahn was an extremely able young man.

The Court: Yes, he is.

Well, I thank both of you gentlemen for your very able presentation.

As for the Court making a rule about apportioning the federal estate tax, one of our Judges in a case a short time ago thought that a stepchild was an heir of a
24 decedent and this question went to the Court of Appeals.

In the interval between the decision in the District Court and the time the Court of Appeals reversed, however, petitions were received in the Probate Office in estates where people who were stepchildren of the decedent were claiming to be heirs.

One case involved a contest between the Government and stepchildren as to whether there was an escheat or whether the stepchildren took as heirs. This caused confusion and uncertainty.

I mention this because in the instant case a decision that the Court may apportion the estate tax and exempt the widow from sharing the tax would mean that the decision in this particular case would have to be dealt with in other cases in the Probate Office before the matter could be passed upon by the Court of Appeals. Just as there are people who want the widow not to have to share, in this estate tax, there are also people who claim that she should.

I think, under the circumstances, that I will have to deny your motion, Mr. Brown.

25 Mr. Brown: Well Your Honor, have you reached that decision without reading the briefs?

The Court: I have read the briefs; I read them before today.

Mr. Brown: I see, Your Honor.

Well, if the Court please, I didn't expect much to the contrary—I will be perfectly frank with you.

(Laughter)

But I think that the Court could reach a contrary decision in that *Herson versus Mills* included no consideration

as to the meaning of these statutes containing the term "surplus" in which the wife is to take a—

The Court: Well, I tell you, that doesn't bother me in the least.

Mr. Brown: No?

The Court: No, and I will tell you why: This phraseology about surplus has been in there for some time and laws have been passed since then. We have a recent law, as a matter of fact, does provide for the giving of
26 five hundred dollars for an allowance to the surviving spouse or for the children, well, that goes in ahead of this distribution of the surplus that we are talking about, and there are other things that can go in there, too.

Mr. Brown: Well, it is entirely possible that the meaning of the word "surplus" as originally intended, was consciously accepted as being a change of the 1916 Act, but I say, if this is so, then it can also consciously be changed by reason of the enactment of the 1948 Act; but to get back to my original point, I fully expected that Your Honor would deny my motion.

I was very happy that the motion was heard by you, because I felt that if any Judge on the District Court would reverse Henson versus Mills, then it would be its author.

However, I held out, certainly, no great hopes for myself. Now as a matter of fact, Your Honor, this question is, I believe, of tremendous importance—the overall question. I got into it, of course, as advocate, but before I was through, to me to was a social problem. Its academic interest far exceeds my personal interest in a fee.

The Court: Well, I am very much interested in
27 that point about how they treat the problem in these different places, because I think they ought to treat common law jurisdictions exactly the same as they do the others, but—

Mr. Brown (Interposing): It seems to me—well, of course, this case, whichever way it is decided, is going to the Court of Appeals and, frankly, I expect the Court of Appeals to hear the case en banc—because I believe that Hepburn versus Winthrop was so undermined by Riggs versus Del Drago—

The Court: I don't see why you say that. All this case that you mentioned last decided was that New York could provide a method of apportionment.

Mr. Brown: But, in so stating, they turn down the argument of the Federal Estate Tax Law attorneys on where the burden of tax shall fall.

The Court: Oh well, I don't know who—

Mr. Brown: One case I cited to Your Honor was the *In Re Hamlin* case which considered the New York apportionment law.

The Court: I remember in that case that definite point was raised.

Mr. Brown: Yes and I say in Hepburn and Win-
28 throp the Court reached its decision on the necessary
 modifications of the Federal Statute while Del Drago
says you don't look to the Federal Statute to see where
the tax is borne.

The Court: Well, the thing about it is, while you seem to think I had gone to that decision for the purpose of at least some of this determination, I thought that case held that it was a transfer tax.

Mr. Brown: Oh—well, that may have been a point involved, but insofar as apportionment was involved, it reached its result by imposing the tax burden on the personal residuary estate in the hands of the executors on the necessary implications of the Federal Statute which stated that the tax is to be paid by the executor before distribution of the estate. The language says that it is in the nature of an administrative expense so from this necessary implication we put the tax burden on the residue.

Under Riggs versus Del Drago however they didn't look

to the necessary implications of the Statute—they looked to the local law.

The Court: Well, I thought that they recognized that there was a transfer tax there and they were simply saying that New York was within her rights in saying—

29 Mr. Brown (Interposing): In Del Drago?

The Court: Yes.

Mr. Brown: Oh—that is correct.

The Court: In saying that it could be apportioned the tax could be apportioned, by New York.

Mr. Brown: Yes.

The Court: They might properly do that.

Mr. Brown: But Your Honor, you will see also that in Riggs vs. Del Drago the Court stated as follows: (And I think this is the key to the whole case)

“It was argued to the Supreme Court that under Section 826(b) of the 1939 Code which commanded that the tax be paid by the executor before distribution of the estate, this necessarily required the tax to be borne by the entire estate and there could not be an apportionment because of the statutory provision of the Federal Law.”

The Court said:

“That section does not command that the tax is an inflexible charge on the residuary estate. To read the words ‘the tax shall be paid out of the estate’ as meaning
30 ‘the tax “ ‘shall be paid out of the residuary estate”’ is to distort the plain language of the section and to create an obvious fallacy. In short, section 826(b) simply provides—”

And continuing.

In other words, Your Honor, they are saying that the Federal Statute is not controlling, as you argue that it is, and it was the basis for the series of decisions ruling against the apportionment.

The Court: Well I didn't think that at all. I read those cases both for and against apportionment when I had this

other case under consideration and I think there is no question about it being a transfer tax; that is, the Federal Estate tax being a transfer tax, not a tax on inheritance.

Mr. Thibodeau: May I be heard, Your Honor?

The Court: Yes.

Mr. Thibodeau: You have stated, Your Honor, that you have denied the plaintiff's motion in this case.

The Court: Yes.

Mr. Thibodeau: Does this also mean you are granting, necessarily, the Defendant's cross motion?

The Court: Now, this is a motion of plaintiffs for summary judgment and I am denying that motion.

Mr. Thibodeau: Yes.

31 The Court: And yours is the cross-motion.

Mr. Thibodeau: Yes.

The Court: I am granting that.

Mr. Thibodeau: Thank you very much.

BRIEF AND APPENDICES FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR and THE RIGGS NATIONAL BANK OF
WASHINGTON, D. C., as Executors of the Estate of
CHARLES DELMAR, Deceased, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal From Order and Judgment of the United States
District Court

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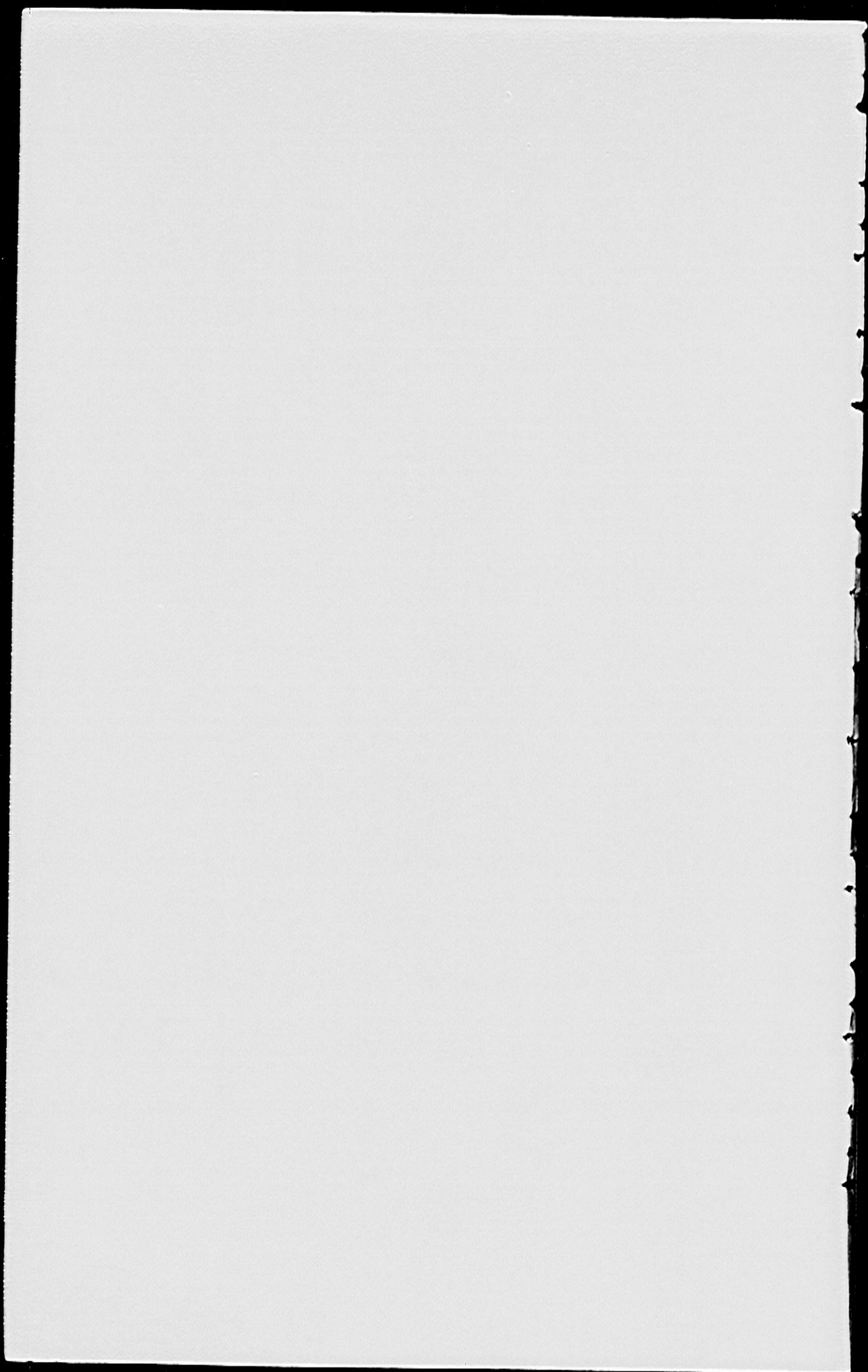
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Washington, D. C. 20006

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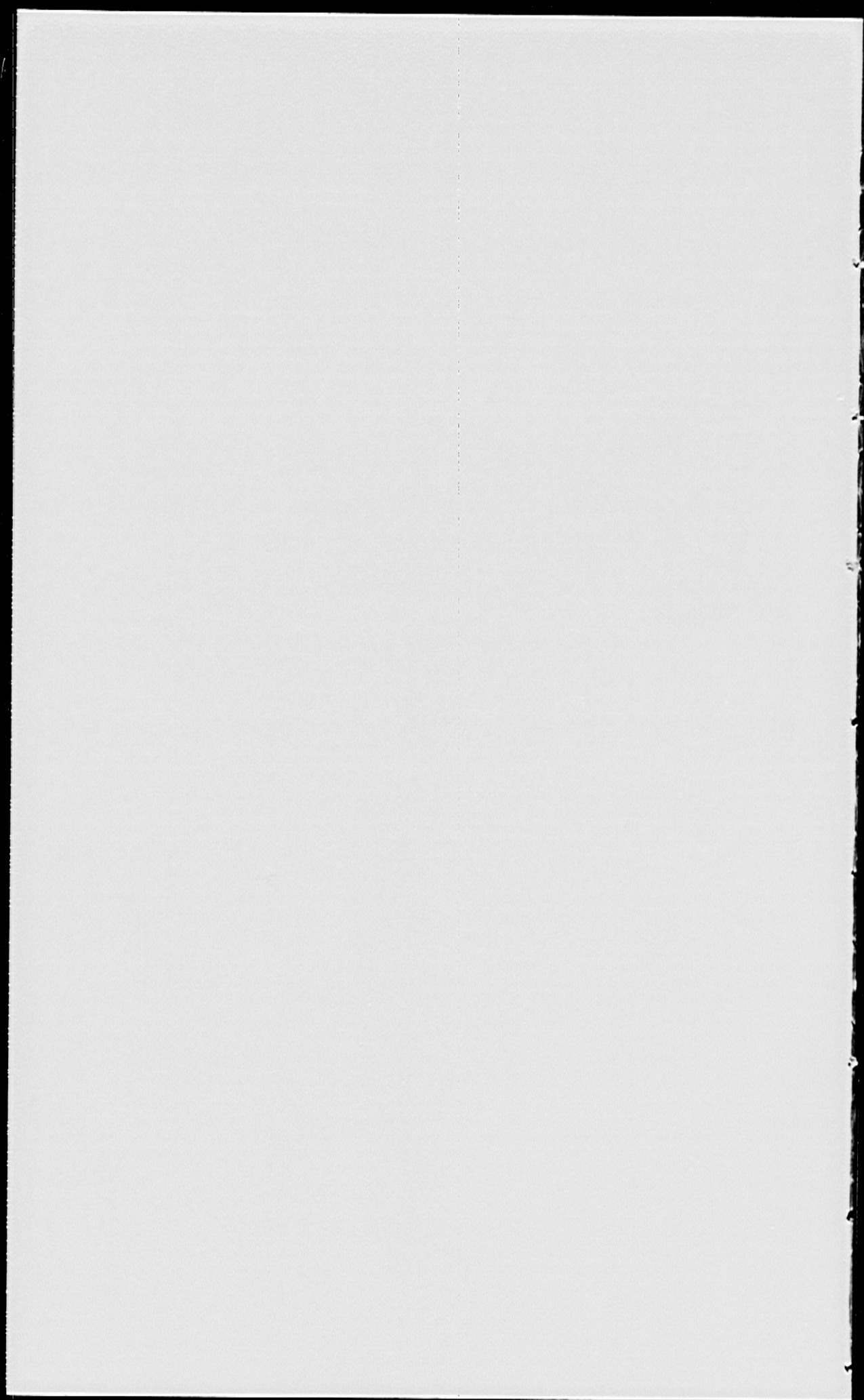
JUN 28 1967

Nathan J. Paulson
CLERK



STATEMENT OF THE QUESTION PRESENTED

In determining, as though he had died intestate, the "surplus" of a decedent's estate, a statutory share of which passes to his surviving spouse in accordance with the applicable law of the District of Columbia by virtue of her renunciation of his will, such share in either case otherwise qualifying for the marital deduction, is the "surplus" to be determined before or after estate taxes, both Federal and local?



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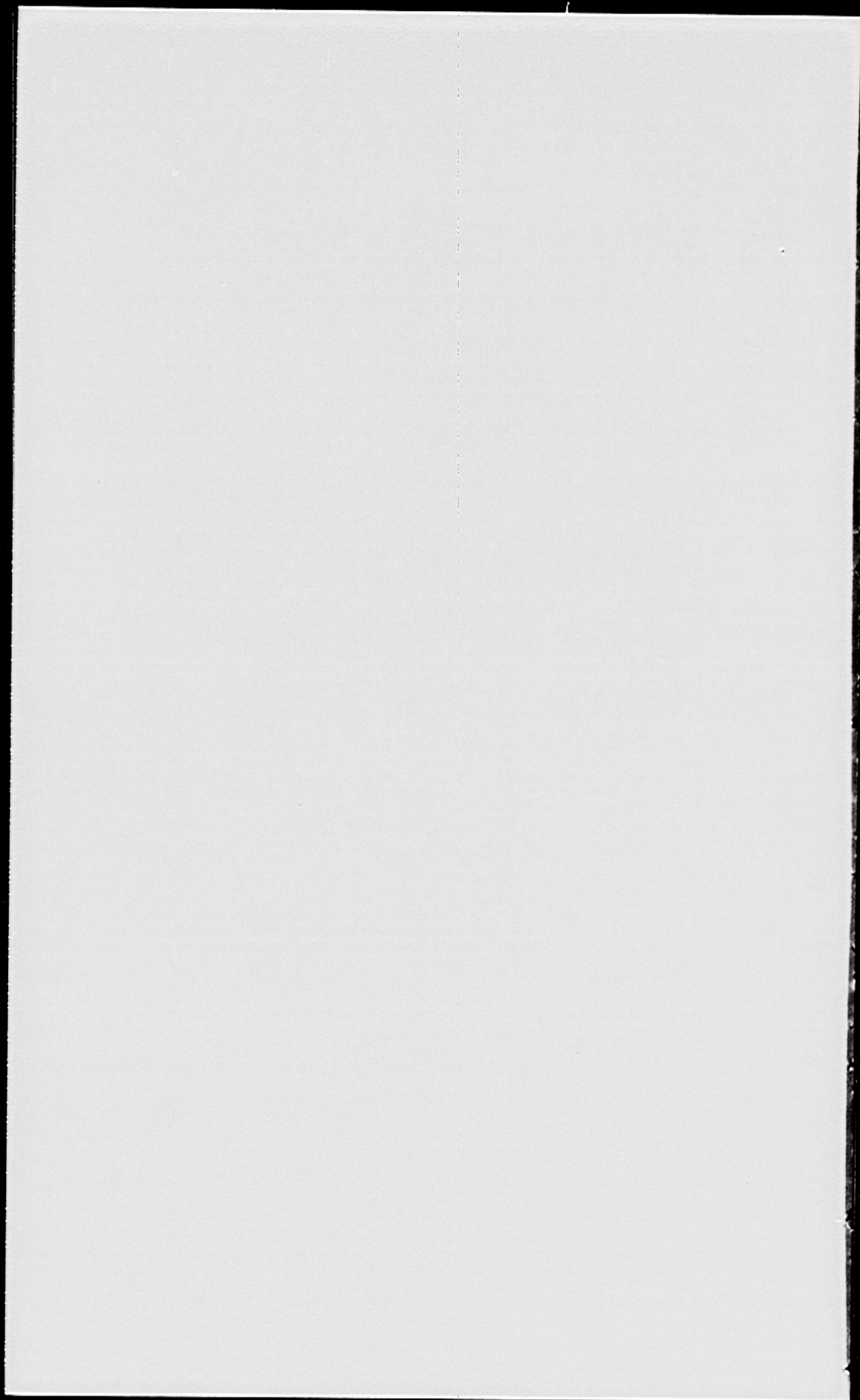
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR and THE RIGGS NATIONAL BANK OF
WASHINGTON, D. C., as Executors of the Estate of
CHARLES DELMAR, Deceased, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From Order and Judgment of the United States
District Court

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

In the Federal estate tax return filed by appellants, the amount of the marital deduction claimed for Federal estate tax purposes was determined on the theory that the surviving widow's elective share of the decedent's estate, though less than one-half of the adjusted gross estate,

was subject to and must be reduced by a part of the Federal and District of Columbia estate taxes. Thereafter, the Executors on June 24, 1965 filed a timely claim for refund on the basis that the amount otherwise constituting the allowable marital deduction should be reduced by neither of such taxes. Such claim was denied by the District Director of Internal Revenue on February 4, 1966.

Thereafter, under Section 1346(a)(1) of Title 28 of the United States Code, appellants filed with the United States District Court for the District of Columbia a Complaint seeking the refund of tax on the basis asserted in the claim for refund filed. Still thereafter, appellants filed a Motion for Summary Judgment, supported by affidavits, to which appellee responded by a Cross-Motion for Summary Judgment.

After hearing oral argument, the Court below, on March 7, 1967, filed its Order and Judgment denying appellants' Motion for Summary Judgment and granting appellee's Cross-Motion for Summary Judgment and dismissing the action with prejudice.

On May 2, 1967, appellants noted their appeal to this Court pursuant to Rule 73(a) of the Federal Rules of Civil Procedure. Jurisdiction of this Court is invoked under the provisions of Sections 1291 and 1294, Title 28, of the United States Code.

STATEMENT OF THE CASE

Charles Delmar, a resident of Washington, D. C., died August 17, 1963, testate, survived by a widow and one son, leaving, before death duties, a probate estate for distribution (plus real estate) having a date of death value in excess of \$7.6 million. (Plfs. Exh. 2 (pp. 1 and 2) to Plfs. Exh. A; Plfs. Exh. 2 to Plfs. Exh. B.)

By the terms of his Will (Paragraph (11)), the residue of the decedent's estate was devised to Trustees to be held

for the benefit of decedent's son, Roland H. del Mar, and provision was made (Paragraph (14)) that the Executors should pay out of the residuary estate (without any right of reimbursement) all estate, inheritance and succession taxes. (Plfs. Exh. 1 to Plfs. Exh. A.)

The decedent's surviving spouse, under Section 18-211 of the District of Columbia Code (1961 Ed.), filed a written renunciation of the provision made for her in the Will and elected to take her one-third statutory share in the real and personal estate of the decedent. (Complaint and Ans. para. 4; Plfs. Exh. 7 to Plfs. Exh. A.)

In the Federal estate tax return filed by the Executors, the amount of the marital deduction claimed for Federal estate tax purposes with respect to the wife's elective share was determined on the theory that such share, though less than one-half of the adjusted gross estate, was subject to, and must be reduced by, a part of the Federal and District of Columbia estate taxes. (Plfs. Exh. 2 (p. 34 "Proof of Federal Estate Tax") to Plfs. Exh. A.) On being advised that they had proceeded upon an erroneous basis, the Executors, on June 24, 1965, filed a claim for refund on the basis that the amount otherwise constituting the allowable marital deduction should be reduced by neither of such taxes. (Complaint and Ans. para. 8; Plfs. Exh. 5 to Plfs. Exh. A.) Such claim was denied by the District Director of Internal Revenue on February 4, 1966. (Complaint and Ans. para. 9; Plfs. Exh. 3 (p. 3) of Plfs. Exh. A.)

Were there no marital deduction provided for in the statute, the Federal estate tax on decedent's estate would have amounted to \$2,932,752.83 which would have been shared \$977,584.28 by the widow and \$1,955,168.55 by the residuary estate. Under the return as filed (with the marital deduction as therein claimed), the Federal estate tax amounted to \$1,976,246.65 (a reduction of \$956,506.18) of which the widow's share amounted to \$658,748.88, while that of the

residuary estate amounted to \$1,317,497.77. Under appellants' theory of this proceeding, the Federal estate tax would be reduced to \$1,620,303.83 (or a further reduction of \$355,942.82). The Federal estate tax burden of the widow would be eliminated (a reduction of \$658,748.88), while that borne by the residuary estate would amount to \$1,620,303.83 (or an increase to it of \$302,806.06). (Plfs. Exh. 1 to Plfs. Exh. B.)

On appellants' theory as to the sharing of the tax burden, however, the Federal estate tax on the residuary estate would still be \$334,864.72 smaller than if there were no marital deduction provision.

STATUTES INVOLVED

The relevant part of pertinent statutes, both Federal and local, are set forth in Appendix B.

STATEMENT OF POINTS

The points upon which plaintiffs-appellants rely on appeal are:

1. The Court below erred in ordering, adjudging and decreeing that the Plaintiffs' Motion for Summary Judgment "be and the same is hereby overruled and denied,"
2. The Court below erred in ordering, adjudging and decreeing that "the Defendant's Motion for Summary Judgment be and the same hereby is granted and that this action is hereby dismissed with prejudice," and
3. The Court below erred in determining, by the afore-said action, that the statutory "surplus" of the decedent's estate, a one-third share of which passed to his surviving spouse by virtue of her renunciation of his will, and otherwise qualified for the marital deduction for Federal estate tax purposes, was to be determined after estate taxes, both Federal and local.

SUMMARY OF ARGUMENT

1. The basis on which *Hepburn v. Winthrop, infra*, rests, insofar as it may be said to have established for the District of Columbia a rule against apportionment of estate taxes, has been completely nullified and destroyed. Accordingly, *Herson v. Mills, infra*, rests upon an erroneous foundation.

2. Based upon logic and equity, it should be the law in the District of Columbia that absent a local applicable statute specifically to the contrary, the estate tax, in the case of intestacy (which is applicable where, as here, a renunciation is involved), should be apportioned among those sharing in the estate in the proportion to the amount received by each *and* as each receipt contributed to the overall tax imposition.

3. Whether or not such rule be generally adopted by this Court, a limited rule of apportionment can and should be adopted by it in the marital deduction area in order to reach the result intended by the Congress.

4. Congress intended, by the Revenue Act of 1948, to extend to taxpayers in common law states and the District of Columbia the advantages of "estate splitting" otherwise available only in community property states. If such equality is to be accomplished for persons in noncommunity property jurisdictions, the surviving spouse must be permitted to take his or her qualifying interest in the estate free from Federal estate taxes. If such surviving spouse must pay Federal estate taxes on his or her qualifying interest, such spouse will receive less than his or her counterpart in a community property state, and the purpose of Congress will be thwarted. To accomplish such equality, this Court must adopt a rule of equitable apportionment of the tax, such rule being no more than a facet of the doctrine of contribution otherwise followed by the District of Columbia courts.

5. Adoption of an apportionment rule for the District of Columbia is desirable as being equitable; the overwhelming trend in the United States is to that end; and adoption of such rule by this Court will further accomplish the desirable end of avoiding conflict in marital property rights with the neighboring States of Virginia and Maryland.

6. The rule of stare decisis should not be applied and this Court should re-examine the District of Columbia position on apportionment of the Federal estate tax in light of *Riggs v. Del Drago, infra*, and the purpose and intent of the Congress in enacting in 1948 the marital deduction provision of the Federal estate tax law.

7. The District of Columbia courts in seeking to apply the doctrine of equitable apportionment to the facts are not faced with the same problem of statutory construction as are the courts of the several States.

8. The word "surplus," as used in Sections 18-701 and 18-703 of the District of Columbia Code, was originally adopted as meaning *before* any death duty. *If*, as the result of the enactment of the Federal Estate Tax Law in 1916, it was necessary, by interpretation, to change the meaning of the word "surplus" to mean *after* death duties, then it is also necessary (at least in the marital deduction area) to restore to the word "surplus" its original meaning as the result of the marital deduction provisions of the Federal Estate Tax Law enacted by the Congress in 1948.

9. It is and always has been the policy of this Court to protect the wife by securing for her a reasonable portion of her husband's estate.

ARGUMENT

A widow who, by virtue of her renunciation of the decedent's will, receives a share of the estate in accordance with the laws of the District of Columbia, takes such share free of any estate tax burden.

- (a) It is or should be the rule in the District of Columbia that, absent a local applicable statute or a controlling provision in the will dealing therewith, the Federal estate tax is to be equitably apportioned among the persons interested in the estate in the proportions that the share of each contributes to the tax burden.

At the outset, appellants recognize that the issue here presented, in essence, was resolved adversely to them in *Herson v. Mills*, 221 F. Supp. 714 (D.C. D.C. 1963) wherein the Court stated that:

" * * * It is a general rule that where neither the will of the decedent nor the law [statutory?] of the jurisdiction provides otherwise, the burden of the federal estate tax rests, like other administrative expenses, on the general estate and is not apportioned among the beneficiaries of the estate. * * * "

In reaching its decision, the Court relied upon *Hepburn v. Winthrop*, 65 App. D.C. 309, 83 F. 2d 566, 105 A.L.R. 310 (C.A.D.C. 1937). Appellants assert that the principle applied was erroneous; that it is not supported by the *Hepburn* decision; and that, if so supported, such latter decision is predicated upon an erroneous concept of the law and should be appropriately reversed, limited or modified as to permit reaching of the result herein contended for.

Matters To Be Considered

To resolve the problem, it is desirable to first review at considerable length (a) the development of the so-called (former) "general rule" against apportionment, (b) the subsequent destruction of its basis by the Supreme Court in 1942, and (c) the overwhelming modern trend to appor-

tionment. In view of the specific limited problem presented, it is also necessary to review (d) the Congressional effort, by the marital deduction provision of the Federal Estate Tax Law, to provide for full equalization of the estate tax burden between community property and common law states, and (e) the history underlying pertinent local statutory provisions dealing with intestate descent and distribution.

Development of Rule Against Apportionment

Prior to the Revenue Act of 1916, all death duties imposed by the Congress had been of the inheritance tax type. Section 29 of the Act of June 13, 1898 (30 Stat. 448, 464), in imposing such a tax, expressly provided that "all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed [of property], as aforesaid, shall be exempt from tax or duty." By amendment of such legislation (adopted by the Act of March 2, 1901, 31 Stat. 938, 949), provision was made that any such tax paid "shall be deducted from the particular legacy or distributive share on account of which the same is charged."

Under those provisions, no question existed as to where the burden of the tax was to be placed or as to whether the surviving spouse bore any tax burden. In 1916, however, the Congress enacted an estate tax (as distinguished from an inheritance tax) and nothing in the bill, as originally introduced, gave any indication from what funds the estate tax was to be paid. In the Senate, however, the bill was amended by adding the language* presently contained in section 2205, Internal Revenue Code of 1954 (section 208, Revenue Act of 1916) which, notwithstanding dictum to the contrary contained in two Supreme Court decisions in 1924,

* i.e., that "it being the purpose and intent * * * that so far as is practicable and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution."

was almost uniformly misconstrued until the further decision by that Court in *Riggs v. Del Drago*, *infra*, in 1942.

After the enactment of the original Federal Estate Tax Law, the state courts were immediately confronted with the problem of apportionment, *i.e.*, what persons or interests should bear the ultimate burden of the tax. The first case bearing on the problem arose in New Hampshire in 1918 (*Fuller v. Gale*, 78 N.H. 544, 103 A. 308). There the decedent left certain specific and residuary legacies. The question of which of those funds was to bear the tax was one of the several issues before the court. It considered and disposed of the problem in one paragraph, holding that the tax was to be paid pro rata by all sharing in the estate. In arriving at the result, it reasoned that in the absence of any direction in the will, the tax was to be apportioned among the beneficiaries. The court only made reference to the Act as a whole; it did not advert to any section as controlling.

In the same year Illinois, in the administration of its state inheritance tax law, was presented with the question whether, in determining the amount to be subjected to the state tax, the Federal estate tax was deductible. Holding that the latter could properly be considered "as a debt or an expense of administration of the estate" (deductible by statute in determining the amount subject to the inheritance tax) *because* "made payable by the executor or administrator to the collector or deputy collector by the express provisions of the statute," the court held for the taxpayer. *People v. Pasfield*, 284 Ill. 450, 120 N.E. 286, 288 (1918). On the reasoning that the tax was "an expense of administration," Connecticut reached the same result with respect to the same problem. *Corbin v. Townshend*, 92 Conn. 501, 103 A. 647 (1918). *Contra: Hazard v. Bliss*, 43 R.I. 431, 113 A. 469 (1921).

Also in the same year a Surrogate's Court in New York (*In re Douglass' Estate*, 171 N.Y.S. 956, 104 Misc. Rep. 359

(1918)) had occasion to consider the newly-enacted Federal Estate Tax Law. There the testator left a will providing for certain specific bequests with the residue to his children, making no provision as to where the Federal estate tax impact should fall. The Court held that a rule of equitable apportionment should be applied. It stated as follows:

"The will being silent upon the question, it should be decided by the court upon principles of equity and justice, and it would be inequitable to charge the children of the testator, who are residuary legatees, with the payment of this tax while exempting from such payment collateral relatives who are recipients of substantial testamentary gifts from the testator. It seems, therefore, that the tax should be deducted proportionately from each legatee, and that the amount to be deducted is that proportion of the entire tax assessed against the estate which the individual legacy bears to the entire net estate. * * * "

Nine months thereafter the same question, in another proceeding, reached the New York Court of Appeals in *In re Hamlin*, 226 N.Y. 407, 124 N.E. 4, 7 A.L.R. 701 (1919). Although *In re Douglass' Estate*, *supra*, was cited to that Court as authority, it ruled that the tax was payable from the residuary estate and was not to be apportioned. In reaching its decision, the Court referred to the Federal inheritance tax statute of 1898 which, as amended, provided for payment by each legatee and asserted that had "the Congress desired to provide for an apportionment of a tax amongst legatees, it might readily have used language adopted by that body" in 1901. It continued that the "plain intent and obvious meaning of the Act of Congress * * * indicate clearly that the Act imposes an 'estate tax' as distinguished from an inheritance tax, [and] that the tax is payable by the estate rather than by the legatees." It concluded that:

" * * * As to the equity of requiring payment of the tax by the residuary legatees and relieving the remain-

ing legatees from any contribution to the same, the question is susceptible of conflict of opinion. The Congress has spoken, and it is our function to interpret, not to legislate."

Massachusetts was called upon to adjudicate the same matter later in that year. *Plunkett et al. v. Old Colony Trust Company et al.*, 223 Mass. 471, 124 N.E. 265, 7 A.L.R. 696 (1919). Here, too, the Court, relying on *In re Hamlin*, *supra*, decreed that the residue should bear all the Federal estate tax, concluding that:

" * * * The [estate tax] law makes no provision for apportionment of the tax among legatees, but leaves it simply to be paid out of the estate before distribution is made."

Before the question came to the United States Supreme Court, a lower court in Pennsylvania (*Newton's Estate*, 74 Pa. Super. 361 (1920)) had adopted the New York and Massachusetts position, while Kentucky (*Hampton's Administrators v. Hampton*, 188 Ky. 199, 221 S.W. 496, 10 A.L.R. 515 (1920)) ruled that in the case of intestacy every portion of the estate should bear its proportionate part of the tax. The latter Court, with complete justification as is evidenced by *Riggs v. Del Drago*, *infra*, stated that it did "not regard as controlling the fact that the primary duty of paying the tax is imposed upon the executor" by the statute.

Again in *Bemis v. Converse*, 246 Mass. 131, 140 N.E. 686 (1923), however, it was said that the Federal Estate Tax Law contained no provision for the apportionment of the estate tax except the one relating to life insurance (added by section 408, Revenue Act of 1918—the substance of which is presently contained in the first two sentences of section 2206 of the 1954 Code), and that "the presence of this provision indicates that no other apportionment was intended by the Congress."

Although the Supreme Court in *Young Men's Christian Association of Columbus, Ohio v. Davis*, 264 U.S. 47, 51 (1924) and in *Edwards v. Slocum*, 264 U.S. 61, 63 (1924), by dictum, indicated that the distribution of the tax burden among the several beneficiaries was a matter of state regulation, such, until 1942, was generally disregarded by the courts. Thus, in *Farmers Loan and Trust Co. v. Winthrop*, 238 N.Y. 488, 144 N.E. 769 (1924), the Court, although referring to the *Young Men's Christian Association* decision, relied upon *In re Hamlin*, *supra*, for the proposition that the executor could not recover any part of an estate tax from the transferee of a taxable inter vivos transfer. It referred to the "exception" provided in the statute with regard to the proceeds of insurance policies, but stated that such "does not permit the court to create other exceptions by any supposed analogy."

Again in *In re Oakes*, 248 N.Y. 280, 162 N.E. 79 (1928), also involving the question of contribution from an inter vivos transferee whose property was subjected to the estate tax, Judge Cardozo, thereafter to become a Justice of the United States Supreme Court, stated that the burden of the estate tax was *unmistakably* "fixed" by the terms of Federal statute.

In 1937 this Court, in *Hepburn v. Winthrop*, *supra*, was presented with the problem whether the Federal estate tax should be apportioned between real estate and personal property (both comprising the residue of the estate) or whether, since the executors took title only to the personal estate, the tax was payable solely therefrom. In approving the latter source as the one to bear the entire tax burden, the Court relied on *Corbin v. Townshend*, *supra*; *In re Hamlin*, *supra*; *Plunkett v. Old Colony Trust Co.*, *supra*; and *Turner v. Cole*, 118 N.J. Eq. 497, 179 A. 113 (1935) (which, in turn, was based on *Hamlin* and *Plunkett*) stating that so far as it knew "all the cases hold that, failing some provision in the will declaring otherwise, the tax is payable

out of that portion of the residue to which the executor takes title." While recognizing the "reasonableness" of each element of the *taxable* estate bearing its share of the burden, the Court stated that the Congress left that question open to action either by the testator in the will or by the states "through statute"; and that since there was no direction in the will and "no [local] statute dealing with the subject," the Court was required to look "to the Federal statute and the necessary implications from its terms." The Federal statutory provision "that the tax is to be paid by the executor before distribution," stated the Court, "implies that the tax is of the nature of an administration expense," the burden of which fell upon the personal estate.

Still later, bowing to the same reasoning that because "the tax is payable by the executor before distribution," and, therefore, like other charges against the estate, is an expense of administration payable out of the residue, the Supreme Court in New Hampshire reversed its decision in *Fuller v. Gale, supra. Amoskeag Trust Company v. Trustees of Dartmouth College*, 89 N.H. 471, 200 A. 786, 117 A.L.R. 1186 (1938).

That the rule adopted by the foregoing decisions was the "general" or "majority" rule for many years prior to 1942 cannot be denied. On the other hand, however, it cannot be denied that the "question was treated as one of Congressional intent, and thus as a Federal question" (*Wilmington Trust Co. v. Copeland*, 33 Del. Ch. 399, 94 A. 2d 703, 708 (1953))* which was "an erroneous concept of the Federal Estate Tax Act." *Pearcy v. Citizens Bank & Trust*

* "The authorities are in substantial agreement that prior to 1942 it was thought that the Federal statute which imposed the estate tax had * * * pre-empted the field and that it was not open to the state courts to create other or different exceptions." Fleming, *Apportionment of Federal Estate Taxes*, 43 Illinois Law Review 153, 155 (1948). See also Scoles and Stephens, *The Proposed Uniform Estate Tax Apportionment Act*, 43 Minnesota Law Review 907, 913-914 (1959).

Co. of Bloomington, 121 Ind. App. 136, 96 N.E. 2d 923 (1951) and *Re Gallagher's Will*, 57 N.M. 112, 255 P. 2d 317, 37 A.L.R. 2d 149, 163 (1953).

Basis of Rule Against Apportionment Destroyed

That the *basis* of the rule against apportionment was an invalid one was established by the Supreme Court in 1942 in *Riggs v. Del Drago*, 317 U.S. 95, 87 L. ed. 108, 142 A.L.R. 1131. There, upholding legislation of the State of New York (section 124, Decedent Estate Law) providing for the apportionment of any Federal death tax, the Court stated that:

" * * * Section 826(b) [1939 Code] does not command that the tax is a non-transferable charge on the residuary estate; to read the phrase 'the tax shall be paid out of the estate' as meaning 'the tax shall be paid out of the residuary estate' is to distort the plain language of the section and to create an obvious fallacy. * * * In short, section 826(b) * * * simply provides that, if the tax must be collected after distribution, the final impact of the tax shall be the same as though it had first been taken out of the estate before distribution, thus leaving to state law the determination of where that final impact shall be."

"The result [of that decision] was not only to sustain section 124 of the New York Decedent Estate Law but also to nullify the prior New York decisions, such as the *Hamlin*, *Winthrop* and *Oakes* cases * * * which held that the residue must bear the impact of the federal estate taxes because of the supposed Congressional direction." *In re Gato's Estate*, 97 N.Y.S. 2d 171, 177, 276 App. Div. 651 (1950), *aff'd* without op. 301 N.Y. 653, 93 N.E. 2d 924.

To the decisions cited as having their basis "nullified" must be added *Plunkett et al. v. Old Colony Trust Company*, *supra*; *Newton's Estate*, *supra*; *Bemis v. Converse et al.*, *supra*; and the decision of this Court, *Hepburn v. Winthrop*, *supra*—at least to the extent of its reliance upon

any of the foregoing decisions and upon "the Federal statute and the necessary implications from its terms." *

If, therefore, the last cited decision may be said to have adopted a rule against apportionment for the District of Columbia requiring, in the absence of any contrary direction in the will, the payment of the full estate tax out of the residuary personal estate (see *In re Berger's Estate*, 50 N.Y.S. 2d 550, 551, stating the alleged District of Columbia rule, and *Herson v. Mills*, *supra*), it is now not only proper but also necessary that this Court reconsider its position against apportionment, in the course of which should be weighed the basic principle underlying equitable apportionment, the purpose and intent of the Congress in enacting in 1948 the marital deduction provision of the Federal Estate Tax Law, the necessary (local) implications favoring apportionment to be drawn from the provisions of that statute, and the current, overwhelming trend toward adoption of the apportionment rule.

Basis of Equitable Apportionment Rule

What is the basic principle of the judicially-applied rule of equitable apportionment as well as the apportionment statutes? Trimble, *Federal Estate Taxation—Some Problems in Apportionment (In Absence of Will Provision or in Intestate Estates)*, 44 Ky. Law Journal 366, 370 (1956) states that:

"The basis of the rule of equitable apportionment is that since the tax is imposed upon the entire taxable estate, it is equitable for the entire estate to bear a proportionate share of the burden of the tax."

* "The result of the *Del Drago* decision was to destroy completely the foundation on which the nonapportionment rule had been erected. As a consequence, there has been a complete reversal of the trend of decisions, and the modern trend is definitely in favor of the equitable apportionment of Federal estate taxes." Lauritzen, *Apportionment of Federal Estate Taxes*, Tax Counsellor's Quarterly, Vol. I, p. 69 (1957).

The basis of the rule is nothing more than the equitable principle that the estate taxes should be borne by those whose bequests contribute to the tax burden and, conversely, that all of those whose legacies do not in any way create or add to that burden should not be required to bear it. *Jerome v. Jerome*, 139 Conn. 285, 93 A. 2d 139 (1952). It is an application of the ancient maxim that "equality is equity." That the basic principle is a part of the law of the District of Columbia in other areas admits of no doubt. Cf. *Ottenstein v. Julius Garfinckel & Co.*, 151 A. 2d 925 (1959). In fact, contribution is even allowable between joint tortfeasors (*George's Radio, Inc. v. Capital Transit Co.*, 126 F. 2d 219 (C.A.D.C. 1942)) although barred by the "rigid doctrine of common law" (*Nordstrom v. District of Columbia*, 213 F. Supp. 315, 318 (D.C.D.C. 1963)). Equitable apportionment is simply a facet of that doctrine. *Wilmington Trust Co. v. Copeland*, *supra*.

Limited to the immediate problem here presented, i.e., whether a renouncing widow's share, otherwise qualifying for the marital deduction, should bear any tax, it is submitted that there is every reason for this Court, if not otherwise prevented therefrom by a local statute, to apply the doctrine of equitable apportionment in favor of the surviving spouse. If it fails to do so, "the purpose of Congress will be thwarted." Whittaker and Whittaker, *Equitable Apportionment of Federal Estate Taxes—The Marital Deduction*, 31 Univ. of Kansas City Law Review 266 (1963).

The Congressional Purpose

By the marital deduction provision (section 2056, 1954 Code), equalization of the Federal estate tax burden in common law and community property states was attempted. It is well known that Congress adopted this provision and the split income provisions in 1948 to stem the increasing efforts of common law states to secure for

their citizens the tax advantages which were available in community property states. S. Rep. No. 1013 (Part 2) p. 22 *et seq.*, 80th Cong., 2nd Sess. (1948-1 C.B. 285, 303).

"The purpose of the marital deduction provision was to extend to spouses in common law states the advantages of married taxpayers in community property states, by permitting the surviving spouse to acquire free of estate tax up to one-half of the decedent's adjusted gross estate, *Dougherty v. United States*, 292 F. 2d 331, 337 (6th Cir. 1961), and to bring about a two-stage payment of estate taxes, *United States v. Stapf*, 375 U.S. 118, 128, 84 S. Ct. 248, 11 L. ed. 2d 195 (1963). * * *" *The Citizens National Bank of Evansville v. United States*, 359 F. 2d 817, 819 (7 Cir. 1966). The "general goal of the marital deduction provisions," stated the Supreme Court in *Jackson v. United States*, 376 U.S. 503, 510, 11 L. ed. 2d 871, 876 (1964), "was to achieve uniformity of federal estate tax impact between those States with community property laws and those without them."

Accordingly, for estate tax purposes, a deduction from the value of the gross estate was allowed in an amount equal to the value of any interest in property passing from the decedent to his surviving spouse, limited, however, so that it should not exceed 50% of the value of the adjusted gross estate. Realizing the existing law under the *Del Drago* decision to be, however, that state law determines whether the marital share is to bear any part of the estate tax, it was provided, "to adhere to the patterns of state law" (*United States v. Stapf, supra*), that, for purposes of valuation of any interest passing to the surviving spouse, there should be taken into account the effect (*if any*) which the Federal estate tax or any estate, succession, legacy or inheritance tax under local law has on the net value to the surviving spouse of such interest. Section 2056(b)(4)(A), 1954 Code (Section

812(e)(1) (E), 1939 Code). This provision does "not say that the tax shall or shall not have an effect on the interest of the surviving spouse, but only that if it does have an effect, it shall be taken into account in determining the value of the marital deduction." Whittaker and Whittaker, *supra* (p. 16), at p. 267. Thus, the "basic policy is to permit, rather than to require, one-half of the decedent's property to pass free of tax if transferred to the surviving spouse." Sugarman, *Estate and Gift Tax Equalization—The Marital Deduction*, 36 Calif. Law Review 223, 229, fn. 30 (1948).

Since a testator uniformly has the power to direct where the impact of such tax shall fall, each citizen was given the right to pass one-half of his estate to his surviving spouse free of estate tax by specifically so providing in his will. As to testacy with no direction with respect to the tax burden or in the case of intestacy, each state *could*, by legislation or by court decision if there were no statute to the contrary, provide for an equitable apportionment of any death duty leaving free therefrom property passing to the surviving spouse. The Congressional policy in its attempt to provide estate tax equalization between community and noncommunity property states is well summed up in *Old Colony Trust Co. v. McGowan*, 163 A. 2d 538 (Me. 1960) that:

"* * * Congress did not provide for this equality with community property states but only made it possible for any state to achieve that equality if it was so minded. * * *"

Did the Congress intend a different result with respect to District of Columbia decedents for whom it also acts as the local legislature? Surely it did not—and it is up to this Court to make the intended provision fully effective by adopting a rule of equitable apportionment applicable to the situation, since the Congress evidently believed that to effect the intended result locally, no statutory provision

for equitable apportionment was required. In the language of *Pitts v. Hamrick*, 228 F. 2d 486, 489 (4 Cir. 1955):

"* * * There is no reason why the apportionment may not be made by the courts of the state [District] in application of what they conceive to be the requirements of the state [District] law in the premises as well as by its legislature. Such was the decision of the courts of Kentucky and Ohio, in apportioning the estate tax so as to relieve the share of the widow from the payment of any part thereof. *Lincoln Bank & Trust Co. v. Huber*, Ky., 240 S.W. 2d 89; *Miller v. Hammond*, 156 Ohio St. 475, 104 N.E. 2d 9, 18. * * *

See also *Re Gallagher's Will*, *supra*, and *Seymour National Bank v. Heideman*, 278 N.E. 2d 771 (Ind. 1961).

If the State of "New Jersey would intend its citizens to have the full benefit of the 'geographic equalization' which Congress provided by establishing the marital deduction," (*Dodd v. United States*, 345 F. 2d 715, 718 (3 Cir. 1965)), then surely the Congress would intend that its District of Columbia citizens, for whom it *also* legislates locally, should receive the same full benefit. As further stated in *Pitts v. Hamrick*, *supra*, (at p. 490):

"* * * Where the estate is to receive the benefit of the deduction of the widow's share from the gross estate in order that that share may be relieved of the burden of the estate tax, as Congress intended, it would be unfair and unjust to require her share to bear any portion of the tax; and we find nothing in the law of South Carolina which requires such a result or which would prevent the court from applying equitable principles of apportionment to relieve the share of the widow of this unfair and unjust burden. * * *

"It is inconceivable here that any part of the estate tax should be attributed to the share of the widow, where the purpose of Congress in allowing the marital deduction was to free the interest of the surviving spouse from the burden of that tax and where the estate receives the benefit of the deduction because of that interest."

See also *Hammond v. Wheeler*, 347 S.W. 2d 884, 893 (Mo. 1961) and *Seymour National Bank v. Heideman*, *supra* (at 777).

Assuming that with respect to a District of Columbia problem "the necessary implications" from the terms of the Federal statute are as controlling as they were asserted to be in 1937 (*Hepburn v. Winthrop*, *supra*), the history of subsections (c) and (d) of section 826, 1939 Code (sections 2206 and 2207, 1954 Code) is of paramount significance. In each of those subsections the Congress, prior to 1948, had originally provided (Senate Rept. No. 1631, 77th Cong., 2nd Sess. (1942-2 C.B. 504, 675)) for "a fair and equitable apportionment of the tax burden attributable" to insurance and appointive property regardless of to whom it went. Only to this extent had the Congress exercised its unquestioned Federal power to determine upon whom fell the burden of the estate tax. With the enactment of the marital deduction provisions in 1948, however, the Congress expressly provided *against* any such apportionment to those assets to the extent that such property qualifies for the marital deduction. It is submitted that such latter action is consistent only with a Congressional intent that to the extent *it* was responsible for any rule of apportionment, it intended to provide *against* liability to the surviving spouse where the marital deduction was involved; and that it could not have intended otherwise generally as to District of Columbia decedents for whom it has the sole legislative responsibility.

Overwhelming Trend to Apportionment

It is stated in a recent annotation, 37 A.L.R. 2d 169, 171 (1954), entitled "Ultimate Burden of Estate Tax in Absence of Statute or Will Provision," that:

"In jurisdictions which have passed upon the question for the first time since 1942 [date of the *Del Drago* decision], it is generally held that the burden of estate taxes must ultimately be borne by every part of the

taxable estate and that every beneficiary must pay a pro-rata share of the tax."

While the issue here presented is unique in that the Congress, with respect to the District of Columbia, legislates not only nationally but also locally, the decided and overwhelming trend toward equitable apportionment in the various states is not without significance. Thus, as indicated by Appendix C hereto, the following twenty-one states have adopted statutory provisions favoring equitable apportionment of the estate tax: Arkansas (1943), California (1943), Connecticut (1945), Delaware (1947), Florida (1949), Louisiana (1960), Maryland (1937), Michigan (1963), Minnesota (1961), Nebraska (1949), Nevada (1965), New Hampshire (1959), New York (1930), North Dakota (1967), Oklahoma (1965), Pennsylvania (1937), South Dakota (1961), Tennessee (1943), Virginia (1946), West Virginia (1959) and Wyoming (1959). In addition, two more states, North Carolina (1953) and Oregon (1963), have adopted apportionment statutes specifically limited to the purpose of freeing from the Federal estate tax the share of a widow electing against the will.

Of these states, the legislatures changed the contrary court-adopted rule previously prevailing in California, Connecticut, Louisiana, Minnesota, New Hampshire, New York, North Carolina, Oklahoma, South Dakota, Tennessee and West Virginia.

The courts of sixteen states, *without* legislative assistance, adopted the general rule of equitable apportionment. These include Arizona, Delaware (subsequent statute), Florida (subsequent statute), Georgia, Indiana, Kentucky, Kansas, Missouri, Montana, New Hampshire (subsequent statute), New Jersey, New Mexico, Ohio, Pennsylvania (subsequent statute) and South Carolina.

Two states, Alabama (1951) and Iowa (1963), have adopted statutes against apportionment of the Federal es-

estate tax absent testamentary direction. Also there remain, unreversed by legislative action, decisions against apportionment in nine states. These include Colorado, Hawaii, Illinois, Massachusetts, Mississippi, Rhode Island, Texas, Washington and Wisconsin. Of these Massachusetts, by statute, provides for apportionment as to nonprobate assets; Rhode Island, by decision, provides the same.

Of the remaining five states, there is neither statute nor decision bearing on the problem in four: Alaska, Idaho, Utah and Vermont. Maine adopted an equitable apportionment statute in 1945, but repealed it two years later. Notwithstanding this, the Court, in *Bragdon Trustee v. Worthley et al.*, 155 Me. 284, 153 A. 2d 627 (1959), adopted the rule as to nonprobate assets.

Thus, it may be said of the fifty states that, by statute or decision, 32 favor the general apportionment of Federal estate tax, 2 provide for the exoneration of widows electing against a will, 2 have adopted statutes against apportionment of the tax, 9, by court decision, have ruled against apportionment, 4 have neither statute nor decision bearing on the question, and 1 (at least) adopts a rule of apportionment as to nonprobate assets.

Further indicative of the overwhelming current trend is the recommendation made in 1958 by the National Conference of Commissioners on Uniform State Laws that a Uniform Estate Tax Apportionment Act be adopted by all of the states.

State Problem of Interpretation

Appellants recognize that notwithstanding the enactment of the marital deduction provision in 1948, the courts in some jurisdictions continue to reject the contention that the renouncing widow's share is to be computed before taxes *but* assert that such is predicated on a reason not here applicable. Thus, in *Wachovia Bank and Trust Co.*

v. *Green*, 235 N.C. 654, 73 S.E. 2d 879 (1953), the North Carolina court considered the question here presented and involving a statute giving the renouncing widow a share of "the surplus of the estate." The Court held that the word "surplus," as adopted by the State Legislature, meant that which remained of the estate after payment of "all expenses of administration and debts including taxes"; stated that the subsequent 1948 Federal statute could not in any way change the meaning of an enactment of the State Legislature; and concluded that whether any change should be made in the manner of distribution to the widow "is a matter for the General Assembly." This decision was followed *In re Uihlein's Will*, 264 Wisc. 362, 59 S.W. 2d 641, 38 A.L.R. 2d 961 (1953) ("one-third part of his net personal esstate") and *Old Colony Trust Co. v. McGowan*, 163 A. 2d 538 (Me. 1960) (share after "charges of settlement"). Cf. *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 101 N.E. 2d 604 (1951) (share "after payment of all just claims") and *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E. 2d 695 (1954) (share in property to "be distributed"). However, predicated as they essentially are upon the inability of the Congress to change, by national legislation, the prior interpretation of an existing state legislative provision, their rationale is not applicable herein.

Rule of Stare Decisis

It is also true that, notwithstanding the *Del Drago* decision, some of those jurisdictions which had adopted the former majority rule "have retained the rule because of the principle of stare decisis." Annotation, 37 A.L.R. 2d 169, 179. But the doctrine of stare decisis is not one to be rigidly applied or blindly followed. So used the doctrine would nullify the basic principle of the common law which permits it to grow and develop to meet new and changing social conditions and would soon render the law

* The "General Assembly" immediately acted. See Appendix C as to North Carolina.

inelastic, archaic and useless to serve the needs of a dynamic community. *Amoskeag Trust Company et al. v. Dartmouth College, supra* (117 A.L.R. 1186, 1189). While the doctrine should not be applied so sparingly as to destroy the usefulness of judicial decisions as precedents, neither should it be used so freely as to render inviolable a prior decision of this Court previously rendered under a misconception of a Federal statute. It "is not a doctrine of mortmain". *McKenna v. Austin*, 134 F. 2d 659, 666 (C.A.D.C. 1949).

In view of the foregoing, it is submitted that, absent a local applicable statute providing to the contrary, the surviving spouse, in the case of intestacy or election against the will of a testate decedent, should take his or her statutory share free of any estate tax.

- (b) **No local statutory provision prevents a widow of an intestate decedent, or one renouncing under a will, from taking free of any estate tax burden her share of the "surplus" so long as her share otherwise qualifies for the Federal estate tax marital deduction.**

The provisions of the local Code with which the Court must concern itself are:

Section 49-301: "The common law, * * * the principles of equity and admiralty, * * * shall remain in force except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress."

Section 18-211: "* * * (e) By renouncing all claim to any and all devises and bequests made to her * * * by the will of her husband * * * the surviving spouse shall be entitled to such share or interest in the real and personal estate of the deceased spouse * * * which she * * * would have taken had the deceased spouse died intestate, except that in neither event shall the surviving spouse be entitled to more than one-half of the net estate bequeathed and devised by said will, * * *."

Section 18-701: "When the debts of an intestate, exhibited and proved or notified and not barred, shall have been discharged or settled, or allowed to be retained for as herein directed, the administrator shall proceed to make distribution of the surplus as provided for in this chapter."

Section 18-703: "If there be a widow * * * and a child or children, or a descendant or descendants from a child, the widow * * * shall have one-third only."

Whether a spouse electing against the will shall take "one-third" of the "surplus" free of any estate tax liability will depend upon the meaning which is *currently* to be attributed to the term "surplus". As to its *original* meaning, there can be little, if any, doubt.

"Original" Meaning of "Surplus"

As originally enacted in 1901 (31 Stat. 1189-1436) the Congress, in dealing with the administration of District of Columbia estates, provided, under chapter 854 (sections 364 and 365*), for an accounting by every executor and administrator. More specifically, it was provided that "[I]n such account shall be stated, on the one side, the assets which have come to his hands" while "[O]n the other side shall be stated the disbursements by him made, namely: First. Funeral Expenses * * *. Second. The debts of the deceased * * *. Third. The allowance for things lost * * *. Fourth. His commissions * * *. Fifth. His allowance for costs, attorney's fees and extraordinary expenses which the Court may think proper to allow." That the excess of the "asset" side over the "other side" constituted the "surplus," referred to in chapter 854 (section 373** *et seq.*), is reasonably clear.

That in the determination of the "surplus" *no deduction was to be made for death taxes* is also clear and

* Present Code sections 20-604 and 20-605.

** Present Code section 18-701.

the reason therefor is evident. At the time of the enactment of that Code (1901), there existed no federal or District estate tax. While the Spanish War Revenue Bill of 1898 (30 Stat. 448, 464-466) provided for a Federal graduated inheritance tax on transfers of personal property, such tax was imposed upon each individual legatee or beneficiary and express provision was made (section 29, Fifth) that "all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed [of property], as aforesaid, shall be exempt from tax or duty." It is evident, therefore, that in providing for the widow's share in the "surplus" of an intestate estate in the District of Columbia, Congress legislated in 1901 with the view in mind that her share would bear *no* death duty*—and that the amount of the "surplus" was to be determined *before* any death tax.

Meaning of "Surplus" 1916-1948

With the enactment of the Federal Estate Tax Act in 1916 (39 Stat. 777), however, it is evident that the Office of the Register of Wills and the local District Court (holding probate) were faced with at least an illusory problem in the case of intestacy since some provision had to be made for the collection of the newly-enacted tax levy. Three approaches *could* have been made, either of which would have reached the same result.

Under the first approach, all parts of an intestate estate *then* having been subjected to the tax, it is possible that the original meaning of the word "surplus" was retained. Under this approach, the surplus having been divided as provided for by local statute, the Federal estate tax was *then* set off against each share *before* distribution and in the proportion that each share contributed to the tax.

* Cf. *Merchants National Bank & Trust Company of Indianapolis v. United States*, 246 F. 2d 410, 414 (Fn. 8) (7 Cir. 1957).

Such would have been in keeping with the general rule of statutory construction that a statute is to be construed as it was intended to be understood when passed. *United States v. Stewart*, 311 U.S. 60, 69 (1940).

Under the second approach, it is possible that the situation was met by considering the meaning of the word "surplus" to have been modified in order to meet the estate tax requirement—i.e., that "surplus" thereafter meant an amount determined *after* the tax. Such approach *could* have been made by giving effect to section 1639 of the District of Columbia Code, enacted March 30, 1901, effective from and after January 1, 1902 (31 Stat. 1189, 1436), today contained as a note to section 49-304, District of Columbia Code (1961 Edition). That section reads in part as follows:

"* * * all acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment of this code, and, so far as such acts may vary from or conflict with any provision contained in this code, they are to have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith."

By reason of the so-called "necessary implications" (*Hepburn v. Winthrop, supra*), from the 1916 Act provision (i.e., that the tax was to be paid by the administrator), it is possible that the local authorities construed the 1916 Act as giving rise to an inconsistency in the meaning of the word "surplus" as originally enacted with the result, under the foregoing provision of the District of Columbia Code, that such term was considered to have been modified to require the tax to be considered in its determination. Cf. *First National Bank of Colorado Springs, Colorado v. United States*, 30 F. Supp. 730, 731 (D.C. D.C. 1939). Thus, as stated in *Broden v. Bowles*, 35 F.R.D. 1316 (D.C. D.C. 1964), citing *Jordan v. United States*, 93 U.S.

App. D.C. 65, 207 F. 2d 28 (C.A. D.C. 1953) in support thereof:

"When a later statute of general application is inconsistent with an earlier statute only locally applicable, the earlier statute is repealed to the extent that it is inconsistent."

As to the third possible approach, it is the rule that the meaning of a statute may change with the times (*Pirkey Bros. v. Virginia*, 134 Va. 713, 114 S.E. 764, 29 A.L.R. 1290, 1294 (1922)) and that a statute may be applied to facts and situations unknown and not contemplated by the legislature at the time of its enactment. *Delany v. Moraitis*, 136 F. 2d 129, 132 (4 Cir. 1943). Thus, in the *Pirkey Bros.* decision, the Court stated that:

"We cannot, however, agree with the few courts that hold that the word 'necessity' must be construed to mean the same thing now as it did when the original act was passed in 1779. * * * The word is elastic and relative, and must be construed with reference to the conditions under which we live, * * *."

The *Delany* decision states that:

"* * * We realize, of course, that the existing situation was not actually in the mind of Congress when the statute was passed; but statutory interpretation is concerned in determining not alone what situations were actually in the mind of Congress but also the intent and meaning of the language used when applied to situations that were not foreseen at the time. Many statutes must necessarily be couched, as this one was, in general terms. They must be enforced frequently in situations that could not have been foreseen by the lawmakers; and it is the duty of the courts to give them, if possible, an interpretation that will render them workable and avoid unjust and harsh results. * * *"

See also *Commonwealth v. Tilley*, 306 Mass. 412, 28 N.E. 2d 245, 129 A.L.R. 381, 385 (1940); *Remick & Co. v.*

American Automobile Accessories Company, 5 F. 2d 411, 40 A.L.R. 1511 (6 Cir. 1925); *Cain v. Bowlby*, 114 F. 2d 513, 522 (10 Cir. 1940); and *White v. District of Columbia*, 4 F. 2d 163, 164 (C.A.D.C. 1925).

Thus, following the third approach, in reaching a decision after 1916 as to whether the term "surplus" was to be determined before or after the impact of the Federal estate tax, the fact that Congress in 1901 did not have before it the 1916 legislation was "not enough." *Puerto Rico v. Shell Company*, 302 U.S. 253, 257 (1937). To paraphrase the language of that Court, it would have been necessary, in order to determine that the tax was *not* to be considered in its determination, to go further and say that if the 1916 tax imposition had been foreseen in 1901, Congress would have so varied its language as to exclude the tax as a factor in determining the "surplus". Thus, the 1916 Estate Tax Law having made a new exaction which necessarily had to be provided for, the meaning of the term "surplus" on one of the two latter approaches, could have been modified, to the extent of its then resulting inconsistency, by treating the estate tax as being in the nature of an administration expense since (*Bigoness v. Anderson et al.*, 106 F. Supp. 986 (D.C.D.C. 1952)) it obviously was not a debt of the decedent.

Meaning of "Surplus" 1948 to Date

If, as the result of the Federal Estate Tax Act of 1916, the meaning of the word "surplus" was considered *not* to have been changed from that with which it was originally enacted, then there exists today no reason to change it, and the surviving spouse's share therein is to be determined before any estate tax. *If*, however, as the result of the 1916 Act, the meaning of the term *was* changed to avoid an inconsistency with the subsequent general legislation, then there is every reason to again apply a changed meaning to conform with the intent, the

purpose and the "necessary" implications of the Federal estate tax law subsequently enacted by the Congress in 1948 (62 Stat. 111, 116).

To be emphasized is the statement of the court in *Jackson v. United States, supra* (at p. 510) that:

"* * * the general goal of the marital deduction provision was to achieve uniformity of federal estate tax impact between those states with community property laws and those without them."

While the device of the marital deduction which Congress chose to achieve that uniformity was purposely hedged with limitations, including that contained in subsection (b)(4)(A) of section 2056, the latter was but a recognition of the right of each state (*Riggs v. Del Drago, supra*) to determine the ultimate thrust of the tax. Having thus continued to recognize in the states the right to determine where the burden of the Federal estate tax should lie, it would seem that the Congress, with the enactment of the marital deduction provision, implicitly *expected* that each common law state would determine, *either* by legislation *or* by judicial decision, that the full benefit of the marital deduction would be accorded where applicable to the surviving spouse—the result to be achieved by recognizing that the surviving spouse's share which qualifies for the marital deduction creates no tax liability for the estate.

The Congress having adopted no legislation for the District of Columbia specifically dealing with the apportionment of the tax, one may conjecture in either of two ways: first, that the Congress intended that the estates of intestate District of Columbia decedents were *not* to receive the full benefit of the marital deduction provision, or second, that Congress *intended the contrary* and implicitly expected the District of Columbia courts to determine, by judicial decision, that the full benefit of the

marital deduction would be accorded to the surviving spouse. The first alternative cannot be accepted since it is squarely contrary to the basic concept of the 1948 legislation and to the inferences necessarily to be drawn in aid of its intent and purpose. *Cf. Hepburn v. Winthrop, supra.* Thus, the only question remaining is whether, in the case of intestacy, the District of Columbia courts are prevented from reaching the desired result because of the statutory term "surplus", adopted in 1901, the potential elasticity in the meaning of which is demonstrated above.

In this respect, as stated by Kahn, *The Federal Estate Tax Burden Borne By a Dissenting Widow*,* 64 Michigan Law Review 1499, 1522 (1966):

"* * * the courts should not seek to resolve the question of the estate tax burden on the widow's share solely by reference to the technical definition of the words employed in the state statute defining that share, particularly where the statute was enacted prior to the adoption of the marital deduction provision in 1948."

Professor Kahn further states (p. 1502) that:

"* * * the dispositive issue is not merely a designation of the literal meaning of the statutory language; rather, there must be a determination of the legislative policy underlying the statute and of the question whether the deduction of federal estate taxes furthers or frustrates that policy."

Apropos thereto is the unquestioned principle that the Congress has the sole power to decide what the policy of the District of Columbia law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed by the courts. *Cf. Minnesota Mining*

* This treatise, limited as it is to the specific issue here involved, is commended to the Court, in its entirety, for consideration.

& Manufacturing Co. v. North Jersey Wood Finishing Co., 381 U.S. 311, 321 (1965). In the language of that Court (p. 321):

"* * * it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it [as to the District of Columbia], and therefore we shall go on as before."

This Court, therefore, should determine that the widow's share in an intestate estate will be one-third *before* any estate tax either (1) on the basis that the term "surplus" retains the meaning with which it was originally enacted, *i.e.*, an amount determined before any death tax, or (2) on the basis that had Congress in 1901 had before it the marital deduction provision, it would have expressly so provided (*cf. Puerto Rico v. Shell Company, supra*), or (3) on the basis that the 1948 legislation of general application is so inconsistent with the previously changed meaning of the existing local "surplus" statute, that it must have been intended that the latter again be modified to the extent of such inconsistency.

Such Construction Is the Desirable One

Evidencing the desirability of such a statutory construction is the Report of the Committee on the District of Columbia (H. Rept. No. 679, 87th Cong., 1st Sess., p. 2) with respect to H. R. 7265, a bill "to amend the code of law for the District of Columbia so as to provide a new basis for determining certain marital property rights". There, referring to the fact that the "number of persons with property interests in both the District of Columbia and Maryland is constantly increasing," the Committee states that "it is believed desirable that, so far as possible, marital property rights in the two jurisdictions should be similar so that such persons planning the disposition of their estate or acquiring property will not be faced with conflicting laws." If this be true, does not

the same reasoning make it clearly desirable, to avoid conflict of laws problems, that apportionment of the estate tax should *also* be in line with the law of Maryland (and Virginia) which provides for full exoneration of property passing to a surviving spouse which qualifies for the marital deduction. See Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 Columbia Law Review 261, 267 (1955).

Even further supporting the desirability of a statutory construction favoring the wife are the zealous efforts of the District of Columbia courts to protect the widow in other respects. This Court has stated that it "has declared the long-established policy of the law to be the protection of the wife and the securing to her of a reasonable portion of her husband's estate." *Jordan v. American Security & Trust Company*, 38 App. D.C. 391, 394 (1912); *Mead v. Phillips*, 135 F. 2d 819, 824 (1943). Thus, in the latter decision the Court, in order to protect the interests of a surviving spouse, refused to apply the literal language of the statute dealing with the widow's right of election. Still further the statutory provision for widows in the District "constitutes a recognition and, in part, a restatement of her rights at common law" (*Mead v. Phillips*, *supra*, at 825) and it is axiomatic that "the common law is not immutable but flexible and by its own principles adapts itself to varying conditions." *Manoukian v. Tomasian*, 237 F. 2d 211, 215 (C.A.D.C. 1956).

CONCLUSION

In conclusion, it is submitted (1) that any rule against the equitable apportionment of estate tax which may be said to exist in the District of Columbia is predicated upon an erroneous basis; (2) that the rule favoring apportionment is the fair and equitable one; (3) that the overwhelming trend has been to the adoption of that rule; (4) that the legislative history of, and any inference to be drawn from, the marital deduction provisions indicates that

Congress intended the widow's statutory share of the estate of a District of Columbia decedent, to the extent that it does not exceed 50% of the estate, to be exonerated from any estate tax liability; (5) that by such general statutory provision, any prior statute of local application, to the extent inconsistent, was modified; (6) that if the latter proposition is invalid, nevertheless the word "surplus" is readily susceptible of appropriate interpretation to the desired end; and (7) that should the local courts fail to effect such exoneration, the purpose of the Congress will be thwarted.

Respectfully submitted,

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**APPENDIX A—DOCKET ENTRIES, PLEADINGS
AND JUDGMENT APPEALED FROM**

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1966

Oct. 3 Complaint, appearance filed

Oct. 3 Summons, copies (2) and copies (2) of Complaint issued

Dec. 6 Motion of plaintiffs for summary judgment; statement; exhibit A with exhibits 1 thru 7; exhibit B with exhibits 1 and 2; memorandum; ser. ack. 12/6/66; M.C. 12/6/66. filed

Dec. 7 Summons, copies (2) and copies (2) of complaint issued. Deft. ser. 12-8-66 Atty. Gen. ser. 12-19-66

1967

Jan. 11 Stipulation of counsel extending time for deft. to respond to motion for summary judgment to and including 2-15-67. filed

Feb. 8 Cross-motion of deft. to dismiss for lack of jurisdiction; memorandum; P&A; c/m 2-2; M.C. 2-8. filed

Feb. 9 Withdrawal of deft.'s cross-motion to dismiss per counsel. filed

Feb. 16 Opposition of deft. to plttf.'s motion for summary judgment; cross-motion for summary judgment; statement; P&A; c/m 2-15; appearance of Mitchell Rogovin, Stanley F. Krysa and Joseph H. Thibodeau. filed

Feb. 20 Opposition of plttf. to cross-motion of deft.; c/m 2-20. filed

- Feb. 20 Answer of deft. to complaint; c/m 2-16; appearance of Mitchell Rogovin, Myron C. Baum and Joseph H. Thibodeau. filed
- Feb. 20 Calendared (N) AC/N.
- Mar. 7 Order denying and overruling pltffs.' motion for summary judgment; granting deft.'s motion for summary judgment and dismissing action with prejudice. (N) Matthews, J.
- Mar. 9 Transcript of proceedings 3-1-67. (Rep.: J. Blair—Court's copy) filed
- Mar. 20 Transcript of proceedings 3-3-67; Part I. (Rep. J. Blair— Court's copy) filed
- May 2 Notice of appeal by pltffs. from order of 3-7-67; copy mailed to Joseph H. Thibodeau. Deposit by Brown \$5.00 filed
- May 3 Order granting pltffs leave to deposit \$250.00, with Clerk, by bank cashier's checks, in lieu to bond for costs on appeal. (N) Jones, J.
- May 4 Deposit of \$250.00 by pltffs. into the Court in lieu of appeal bond per order of 5-3-67.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action, File No. 2603—'66

Complaint

(For Refund of Federal Estate Tax)

ROLAND H. DEL MAR (address: The Harbour Square Apartments, Apt. No. S231, 500 N. Street, S. W., Washington, D. C.) and THE RIGGS NATIONAL BANK OF WASHINGTON, D. C. (address: 800 17th Street, N. W., Washington, D. C. 20013), as Executors of the ESTATE OF CHARLES DELMAR, Deceased, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

1. This is a suit of a civil nature arising under the laws of the United States, including the laws providing for Internal Revenue, and including particularly the provisions of Title 28, United States Code section 1346(a)(1), as amended (28 U.S.C.A. section 1346(a)(1)).

2. Plaintiffs, Roland H. del Mar and The Riggs National Bank of Washington, D. C., are executors of the Last Will and Testament of Charles Delmar, Deceased. The Riggs National Bank of Washington, D. C. is a banking corporation organized and existing under the Federal Banking Laws with full authority to act as executor of wills and in other trust capacities.

3. Charles Delmar died August 17, 1963 a resident of Washington, District of Columbia, leaving a Last Will and Testament which was duly admitted to probate in the United States District Court for the District of Columbia, holding a probate court, to which jurisdiction in that behalf belonged. On September 11, 1963, letters testamentary were duly issued out of that Court to Ellsworth C. Alvord and The Riggs National Bank of Washington, D. C. who duly qualified as executors of said Last Will and Testa-

ment. On January 20, 1964, letters testamentary were duly issued out of that Court to Roland H. del Mar as substitute executor in the place and stead of Ellsworth C. Alvord, deceased, and Roland H. del Mar duly qualified as an executor of the said Last Will and Testament. Since January 20, 1964, Roland H. del Mar and The Riggs National Bank of Washington, D. C. have been and still are duly qualified and acting as such executors.

4. Within six months after the will of the decedent was admitted to probate and on November 1, 1963, the surviving spouse, Jacqueline Delmar, acting under Section 18-211, Title 18, of the District of Columbia Code (1961 edition), filed with the Probate Court a written renunciation renouncing all claims to any and all devises and bequests made to her under the will and electing to receive her legal share of the real and personal property of the estate. At the time of the decedent's death, he owned real estate located in the State of Maryland. The surviving spouse also renounced the decedent's will in the ancillary administration effected in that State for the distribution of said real estate.

5. The plaintiffs have a just claim against the defendant for the sum of \$355,942.82, or such greater sum as results from the decision of the Court herein, together with interest as provided by law, which said sum was paid by the said executors of the Estate of Charles Delmar, Deceased, to the defendant through the duly appointed, qualified and acting District Director of Internal Revenue for the District of Maryland, as hereinafter set forth.

6. Within the time allowed by law, to wit, on November 16, 1964, plaintiffs filed with the said District Director of Internal Revenue a final estate tax return covering the Federal estate taxes assessable against the Estate of Charles Delmar, having previously filed the preliminary return required by law, and, on that date, paid the estate

tax liability shown on the final return in the amount of \$1,969,231.36.

7. In said Federal estate tax return filed, the amount of the marital deduction claimed (\$1,725,725.58) was determined on the theory that the widow's share, though less than one-half of the adjusted gross estate, was subject to and must be reduced by a part of the Federal and District of Columbia estate tax. On the same theory, the office of the said District Director of Internal Revenue, in making the adjustments hereinafter referred to in paragraph 9, fixed the amount of the allowable marital deduction at \$1,726,620.96.

8. On June 24, 1965, plaintiffs, by mail, duly filed with the said District Director of Internal Revenue a claim for refund dated June 24, 1965 on the basis that the amount otherwise constituting the allowable marital deduction under Title 26, United States Code section 2056, as amended (26 U.S.C.A. section 2056), should not be reduced by either of such taxes.

9. Thereafter, the examining agent, reviewing said final return, made adjustments increasing the reported value of certain assets and reducing certain deductions claimed for administration expenses, none of which are in controversy herein, refused to otherwise increase the amount of the allowable marital deduction, as claimed, and determined that a deficiency existed in the amount of \$7,015.29, together with statutory interest thereon from the final date on which said tax return was due amounting to \$701.53, and the aggregate amount of \$7,716.82 was paid to the said District Director of Internal Revenue on August 25, 1966 covering this requirement. Also by nonregistered letter dated February 4, 1966 the said District Director tentatively proposed for disallowance plaintiffs' claim for refund.

10. This Complaint is filed before the expiration of two (2) years from the date of mailing of the said tentative notice of disallowance.

11. Based upon the grounds set forth in said claim for refund and the facts therein reflected, all of which are incorporated herein by reference, plaintiffs overpaid the Federal estate tax due in the amount of \$355,942.82, or such greater sum as should result from an appropriate decision of this Court.

12. The repayment of the amount of the claimed refund has been demanded but no part of said sum has been credited, remitted, refunded or repaid in any manner to the plaintiffs; and the full amount thereof, together with interest thereon, remains due and owing from the defendant to the plaintiffs.

WHEREFORE, plaintiffs demand judgment against defendant in the principal amount of \$355,942.82, or such greater sum as results from the decision of the Court herein, together with interest thereon as provided by law, from the dates of payment thereof, and all costs of this proceeding.

/s/ HARRY L. BROWN

Harry L. Brown

Counsel for Plaintiffs

200 World Center Building
Washington, D. C. 20006

Of Counsel:

ALVORD AND ALVORD

200 World Center Building
Washington, D. C. 20006

BRACKLEY SHAW, Esquire

SHAW, PITTMAN, POTTS, TROWBRIDGE & MADDEN
910 17th Street, N. W.
Washington, D. C. 20006

District of Columbia) ss.

Roland H. del Mar, being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that he verily believes the facts stated in the Complaint to be true.

/s/ ROLAND H. DEL MAR
Roland H. del Mar

Subscribed and sworn to before me this 27th day of September, 1966.

/s/ FRANCES B. HALL
Notary Public

My Commission Expires Feb. 14, 1970

District of Columbia) ss.

Edwin B. Shaw, being first duly sworn, deposes and says: I am a Vice President of The Riggs National Bank of Washington, D. C., one of the plaintiffs in the above-entitled action; I make this affidavit in behalf of that corporation; I have read the foregoing Complaint and know the contents thereof, and I verily believe the facts stated in the Complaint to be true.

/s/ EDWIN B. SHAW
Edwin B. Shaw

Subscribed and sworn to before me this 20th day of September, 1966.

/s/ ELIZABETH S. WILLIAMSON
Notary Public

My Commission Expires Feb. 28, 1968

[HEADING OMITTED]

Answer

The defendant, the United States of America, by its attorney, David G. Bress, Esquire, United States Attorney for the District of Columbia, for its answer to the complaint herein alleges as follows:

1. Admits the allegations contained in paragraph 1.
2. Admits the allegations contained in paragraph 2.
3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3.
4. Admits the allegations contained in the first sentence of paragraph 4. Denies knowledge or information sufficient to form a belief as to the truth of all other allegations contained in paragraph 4.
5. Admits the allegations contained in paragraph 5, except denies that plaintiffs have any just claim against the defendant for any amount.
6. Admits the allegations contained in paragraph 6.
7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7, except alleges that the District Director's determination speaks for itself.
8. Admits the allegations contained in paragraph 8, except denies each and every allegation contained in plaintiff's claim for refund.
9. Admits the allegations contained in paragraph 9.
10. Admits the allegations contained in paragraph 10.
11. Denies the allegations contained in paragraph 11.
12. Admits the allegations contained in paragraph 12, except denies that any amount remains due and owing from defendant to the plaintiffs.

WHEREFORE, defendant prays that judgment be entered in its favor, dismissing plaintiffs' complaint, allowing defendant its costs and such other and further relief as this Court may deem just and proper.

MITCHELL ROGOVIN
 Mitchell Rogovin
*Assistant United States
 Attorney General*

MYRON C. BAUM
 Myron C. Baum
*Chief, Refund Trial
 Section No. 2*

JOSEPH H. THIBODEAU
 Joseph H. Thibodeau
*Attorneys, Tax Division
 Department of Justice
 Washington, D. C. 20530
 Attorneys for Defendant*

Of Counsel:

/s/ DAVID G. BRESS
 David G. Bress
United States Attorney

[HEADING OMITTED]

Motion for Summary Judgment

Plaintiffs, as executors of the Estate of Charles Delmar, Deceased, by their attorney, hereby move the Court to enter summary judgment for the plaintiffs in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, determinative of the issue whether the surviving spouse of a District of Columbia decedent, having filed a written renunciation under Section 18-211, Title 18, of the District of Columbia Code (1961), takes her

statutory share of the estate free of any Federal or District of Columbia estate tax.

In support hereof, plaintiffs rely upon the pleadings herein, the affidavit hereto attached and marked Exhibit A, Exhibits 1, 2, 3, 4, 5, 6 and 7 attached thereto, and the affidavit hereto attached and marked Exhibit B, Exhibits 1 and 2 attached thereto, all of which show that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

Plaintiffs further request that the Court, in entering its Order pursuant to this Motion, state therein, pursuant to 28 U.S.C.A. section 1292(b), that the Order involves the controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order will materially advance the ultimate termination of the litigation.

Respectfully submitted,

/s/ HARRY L. BROWN

Harry L. Brown

Counsel for Plaintiffs

200 World Center Building
Washington, D. C. 20006

Of Counsel:

ALVORD AND ALVORD

200 World Center Building
Washington, D. C. 20006

BRACKLEY SHAW, Esquire

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910 17th Street, N. W.
Washington, D. C. 20006

[HEADING OMITTED]

Defendant's Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9 of the rules of this Court, the defendant, the United States of America, respectfully opposes plaintiffs' motion for summary judgment and submits that it should be denied for the reasons set forth in its memorandum of points and authorities filed herewith.

Defendant further moves the Court to grant summary judgment in its favor on the grounds that there is no dispute as to any material fact involved in this controversy, and that the defendant is entitled to judgment as a matter of law.

In support of its cross-motion for summary judgment, the defendant relies on its statement of material facts as to which there is no genuine issue and the memorandum of points and authorities in support of its motion, both of which are filed herewith.

MITCHELL ROGOVIN
Mitchell Rogovin
Assistant Attorney General

STANLEY F. KRYSA
Stanley F. Krysa
*Acting Chief, Refund Trial
Section No. 2*

JOSEPH H. THIBODEAU
Joseph H. Thibodeau
Attorney
Tax Division
Department of Justice
Washington, D. C. 20530

Of Counsel:

Attorneys for Defendant

.....
DAVID G. BRESS
United States Attorney

[HEADING OMITTED]

Order and Judgment

The Court, having carefully considered the respective motions for summary judgment filed on behalf of each of the parties hereto, together with the briefs, pleadings, and oral arguments of counsel relating thereto, being of the opinion that the plaintiffs' motion should be overruled and that the defendant's motion should be granted, it is accordingly

ORDERED, ADJUDGED and DECREED by the Court that the plaintiffs' motion for summary judgment be and the same is hereby overruled and denied.

It is further ORDERED, ADJUDGED and DECREED by the Court that the defendant's motion for summary judgment be and the same hereby is granted and that this action is hereby dismissed with prejudice.

DONE this — day of —————, 1967.

.....
United States District Judge

APPENDIX B—STATUTES INVOLVED

Internal Revenue Code of 1954

(68A Stat. 3, 392, *et seq.*)

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) Allowance Of Marital Deduction.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) Limitation In The Case Of Life Estate Or Other Terminable Interest.—

* * *

(4) Valuation Of Interest Passing To Surviving Spouse.—In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

* * *

(c) Limitation On Aggregate Of Deductions.—

(1) General Rule.—The aggregate amount of the deductions allowed under this section * * * shall not exceed 50 percent of the value of the adjusted gross estate, * * *.

SEC. 2205. REIMBURSEMENT OUT OF ESTATE.

If the tax or any part thereof is paid by, or collected out of, that part of the estate passing to or in the possession of any person other than the executor in his capacity as

such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

SEC. 2206. LIABILITY OF LIFE INSURANCE BENEFICIARIES.

Unless the decedent directs otherwise in his will, if any part of the gross estate on which tax has been paid consists of proceeds of policies of insurance on the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the sum of the taxable estate and the amount of the exemption allowed in computing the taxable estate, determined under section 2051. If there is more than one such beneficiary, the executor shall be entitled to recover from such beneficiaries in the same ratio. In the case of such proceeds receivable by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such proceeds except as to the amount thereof in excess of the aggregate amount of the marital deductions allowed under such section.

SEC. 2207. LIABILITY OF RECIPIENT OF PROPERTY OVER WHICH DECEDENT HAD POWER OF APPOINTMENT.

Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross

estate under section 2041, the executor shall be entitled to recover from the person receiving such property by reason of the exercise, nonexercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the sum of the taxable estate and the amount of the exemption allowed in computing the taxable estate, determined under section 2052, or section 2106(a), as the case may be. If there is more than one such person, the executor shall be entitled to recover from such persons in the same ratio. In the case of such property received by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such property except as to the value thereof reduced by an amount equal to the excess of the aggregate amount of the marital deductions allowed under section 2056 over the amount of proceeds of insurance upon the life of the decedent receivable by the surviving spouse for which proceeds a marital deduction is allowed under such section.

* * *

District of Columbia Code
(1961 Edition)

SEC. 18-211. Renunciation of devises and bequests to spouse—Election of dower—Time limitations—Renunciations or elections by guardians or fiduciaries—Renunciations deemed to have been made when nothing passes under bequest or device—Maximum rights upon renunciation—Antenuptial or postnuptial agreements.

* * *

(e) By renouncing all claim to any and all devises and bequests made to her * * * by the will of her husband * * * the surviving spouse shall be entitled to such share or interest in the real and personal estate of the deceased spouse * * * which she * * * would have taken had the deceased spouse died intestate, except that in neither event shall the

surviving spouse be entitled to more than one-half of the net estate bequeathed and devised by said will, * * *.

* * *

SEC. 18-701. Distribution—When to be made.

When the debts of an intestate, exhibited and proved or notified and not barred, shall have been discharged or settled, or allowed to be retained for as herein directed, the administrator shall proceed to make distribution of the surplus as provided for in this chapter.

* * *

SEC. 18-703. When surviving spouse entitled to one-third.

If there be a widow * * * and a child or children, or a descendant or descendants from a child, the widow * * * shall have one-third only.

* * *

SEC. 49-301. Common law, principles of equity and admiralty, and Acts of Congress to remain in force.

The common law, * * * the principles of equity and admiralty, * * * shall remain in force except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress.

* * *

SEC. 49-304. Repeal and savings provisions of 1901 Code.

Sections 1636 to 1643 of act Mar. 3, 1901, 31 Stat. 1434, ch. 854, provided that:

* * *

“Sec. 1639. The enactment of this code is not to affect or repeal any act of Congress which may be passed between the date of this act and the date when this act is to go into effect; and all acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment of this code, and, so far as such acts may vary from or conflict with any provision contained in this code, they are to have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith.”

**APPENDIX C—APPORTIONMENT STATUTES
AND DECISIONS**

Alabama

Ala. Code Tit. 51, sec. 449 (adopted 1951) prohibits apportionment of the Federal estate tax absent testamentary direction.

Alaska

No statute or decision.

Arizona

No apportionment statute. Wife's marital deduction share free of tax on application of equitable apportionment rule. *Doetsch v. Doetsch*, 312 F. 2d 323 (7 Cir. 1963).

See also Opinion of the (State) Attorney General, March 3, 1967, CCH Inheritance, Estate and Gift Tax Reporter, State, Current ¶ 20,047.

Arkansas

Apportionment statute. Ark. Stat. Ann. sec. 63-150 (adopted 1943). Statute held not to exempt marital deduction share. *Williamson v. Williamson*, 224 Ark. 141, 272 S.W. 2d 72 (1954). Statute amended in 1955 retroactive to 1948 to exempt wife's share to the extent that it qualifies for the marital deduction. (Acts 1955, No. 122, sec. 1, p. 292.)

California

Apportionment statute. Calif. Probate Code Ann. sec. 970 et seq. (adopted in 1943) exempts marital deduction share. *In Re Buckhantz' Estate*, 120 Calif. A. 2d 92, 260 P. 2d 794 (1953).

Prior thereto courts had adopted the rule against apportionment. *Rogan v. Taylor*, 136 F. 2d 598 (9 Cir. 1943).

Colorado

No apportionment statute. *Ramsey v. Nordloh*, 354 P. 2d 513 (1960) adopts rule against equitable apportionment.

Connecticut

Apportionment statute. Conn. Gen. Stat. Ann. sec. 12-400 et seq. (adopted 1945). Marital deduction allowance exonerated from tax. *Jerome v. Jerome*, 139 Conn. 285, 93 A. 2d 139 (1952).

Prior to the statutory enactment, the rule was against apportionment. *Ericson v. Childs*, 124 Conn. 66, 198 A. 176, 115 A.L.R. 907 (1938).

Delaware

Apportionment statute. Dela. Code Ann. Tit. 12, sec. 2901 et seq. (adopted 1947). *Wilmington Trust Co. v. Copeland*, 94 A. 2d 703 (1953) states that statute merely restated prior common law.

Florida

Apportionment statute. Fla. Stat. Ann., Vol. 21, sec. 734.041 (adopted 1949). Common law also provided for apportionment and renouncing widow's share was free of tax. *In Re Fuch's Estate*, 60 So. 2d 536 (1952).

Georgia

No apportionment statute. Common law rule of equitable apportionment applies. *Regents of University of Georgia v. Trust Company of Georgia*, 194 Ga. 255, 21 S.E. 2d 691 (1942) and *In Re Comer's Trust*, 101 N.Y.S. 2d 916 (1950) (stating Georgia rule).

Hawaii

No apportionment statute. Rule against apportionment applied. *In Re Glover's Estate*, 371 P. 2d 361 (1962). (A 3-2 decision.)

Idaho

No apportionment statute and no decisions.

Illinois

No apportionment statute. In *Wilson v. Northern Trust Co.*, 101 N.E. 2d 604 (1951) renouncing widow, entitled to a percentage of the estate after payment of "all just claims," required to bear portion of the Federal estate tax.

Indiana

No apportionment statute. In *Pearcy v. Citizens Bank*, 96 N.E. 2d 921 (1951), the court applied equitable apportionment against nonprobate assets. In *Merchants National Bank and Trust Co. of Indianapolis v. United States*, 246 F. 2d 410, 414 (7 Cir. 1957), the court, based on Indiana decisions, determined that a renouncing widow's share of the estate was not free of tax but criticized such decisions as including as "taxes accrued," in determining the widow's share, the Federal estate tax. It noted that the local statute involved "was enacted in 1881, when estate and inheritance taxes were unknown." In 1961, the Indiana Supreme Court, in *Seymour National Bank v. Heide-man*, 278 N.E. 2d 771, held that notwithstanding the lack of an apportionment statute an electing widow's share, to the extent qualifying for the marital deduction, passed to her free of the tax. The basis of the decision is the "reason, logic and equity of the result reached."

Iowa

Statutory rule against apportionment "in testate matters" in absence of testamentary direction to the contrary. Ch. 326, Laws of 1963, effective January 1, 1964.

Prior thereto the Iowa courts applied the doctrine of equitable apportionment to nonprobate assets. *Kitzinger v. Millin*, 117 N.W. 2d 68 (1962).

Kansas

Statutory apportionment of "state estate tax." Kan. Gen. Stat. sec. 79-1501b (adopted in 1941).

In *First National Bank of Topeka, Kansas v. United States*, 233 F. Supp. 19 (D.C. Kan. 1964), the widow of an intestate decedent entitled to a share of his property determined after the payment of certain items (including "taxes") was held to take her share free of the Federal estate tax since the latter was not one of the taxes that the legislature had in mind. The court relied on *In Re Estate of Rooney*, 186 Kan. 280, 349 P. 2d 916 (1960).

Kentucky

No apportionment statute. Doctrine of equitable apportionment was adopted in *Hampton's Administrator v. Hampton*, 221 S.W. 496 (1920). Such was reiterated in *Martin v. Martin's Administrators*, 283 Ky. 513, 142 S.W. 2d 164 (1940) and in *Trimble v. Hatcher's Executors*, 173 S.W. 2d 985 (1943).

Lincoln Bank and Trust Co., Executor v. Huber, 240 S.W. 2d 89 (1951) holds that widow electing statutory share takes free of any Federal tax.

Louisiana

Apportionment statute. La. Stat. Ann. sec. 2431 et seq. (adopted in 1960). Prior thereto apportionment appears to have been applied between separate and community property (*Succession of Ratcliff*, 33 So. 2d 114 (1947)) but as between legatees apportionment was denied. *Succession of Mayer*, 875 So. 2d 303 (1956).

Maine

Adopted an equitable apportionment statute in 1945 (Maine Laws 1945, c. 269), but repealed it two years later (Maine Laws 1947, c. 220). Notwithstanding, the court in

Bragdon Trustee v. Worthley et al., 155 Me. 284, 294, 153 A. 2d 627 (1959) adopted the rule of equitable apportionment as to nonprobate assets. In *Old Colony Trust Co. v. McGowan*, 163 A. 2d 538 (1960), the court refused to exonerate a widow electing against the will from the Federal estate tax on the ground that the latter was encompassed within the statutory term "charges of settlement" in arriving at the distributable balance. It determined that legislation would be necessary to change the result citing *Wachovia, infra* (North Carolina) and *Uihlein, infra* (Wisconsin).

Maryland

Apportionment statute. Md. Ann. Code, art. 81, sec. 162 et seq. (adopted in 1937, amended in 1947, 1957 and 1965). By the Laws of 1937, ch. 544, provision was made for apportionment of the Federal estate tax against inter vivos transfers includible in the taxable estate. By the Laws of 1947, ch. 156, the widow's share of the nonprobate estate was exonerated but her share of the probate estate continued to bear a tax burden. If the wife renounced the will, there was no exoneration. *Weinberg v. Safe Deposit & Trust Co. of Baltimore*, 198 Md. 539, 85 A. 2d 50, 37 A.L.R. 2d 188 (1951).

By the Laws of 1957, ch. 747, a widow electing against the will was exonerated as to nonprobate assets. The Laws of 1965, art. 81, sec. 162 et seq., provided for full exoneration of property passing to a surviving spouse to the extent it qualifies for the marital deduction.

Massachusetts

Apportionment statute. Mass. Ann. Laws, c. 65A, sec. 5 (adopted 1943, amended in 1948). Present law provides for apportionment as to nonprobate assets but no apportionment as to probate assets. Prior to 1948, the statute

provided for apportionment as to both. *Merchants National Bank of Boston et al., Executors v. Merchants National Bank of Boston et al., Trustees*, 318 Mass. 563, 63 N.E. 2d 831 (1945). The 1948 amendment, which continues to date, re-establishes as to property passing by will the common law in Massachusetts before enactment of the original apportionment statute in 1943. *H. Weingartner et al. v. Town of North Wailes et al.*, 101 N.E. 2d 132 (1951).

Michigan

Apportionment statute. Mich. Stat. Ann. sec. 27.3178-165 et seq. (adopted 1963).

In a decision involving a prestatutory situation, the court, in *Old Kent Bank and Trust Company v. United States*, 232 F. Supp. 970, 984 (D.C. Mich. 1964) *revs'd* on other grounds, 362 F. 2d 444 (6 Cir. 1966) held, in the absence of a controlling state decision, that Michigan would adopt the rule of apportionment.

Minnesota

Apportionment statute. Minn. Stat. Ann. Vol. 31, ch. 525, sec. 525.521 et seq. (adopted 1961).

Prior thereto no rule of apportionment applied and tax was payable from the residuary estate. *Gelin v. Gelin*, 40 N.W. 2d 342 (1948). Latter decision recognized and applied in *United States v. Goodson*, 253 F. 2d 900 (8 Cir. 1958).

Mississippi

No apportionment statute and no State court decisions. In *Estate of Rosalie Cahn Morrison*, 24 T.C. 965 (1955), the Tax Court applied the so-called "majority rule" to a Mississippi situation.

Missouri

No apportionment statute. In *Carpenter v. Carpenter*, 267 S.W. 2d 632 (1954), although the will provided for the payment of Federal estate taxes assessed or levied upon any bequests or devises to be payable out of the residuary estate, nonprobate properties were required to bear their respective burdens of tax. In *Old Folks Home of St. Louis County v. St. Louis Union Trust Company*, 313 S.W. 2d 671, where one of the two residuary beneficiaries was exempt from tax, the entire tax due on the residuary estate was charged against the residuary share of the nonexempt residuary beneficiary. *Hammond v. Wheeler*, 347 S.W. 2d 884 (1961) and *Jones v. Jones*, 376 S.W. 2d 210 (1964) rule that the renouncing widow's share is exonerated from the tax.

Montana

No apportionment statute. Doctrine of equitable apportionment adopted in *Marans v. Newland*, 390 P. 2d 443 (1964) but wife there electing against the will was burdened with a share of the Federal estate tax (other than that on nonprobate assets) since the local statute involved subordinated a renouncing widow's statutory share to "all taxes including state and Federal inheritance and estate taxes."

Nebraska

Apportionment statute. Neb. Rev. Stat. sec. 77-2108 (adopted 1949). Amended in 1953 (ch. 94, Laws of 1953, s. 3) to clarify intent that marital deduction was exonerated from the tax.

Nevada

Apportionment statute. Nev. Rev. Stat. sec. 150.290-39 (adopted 1965).

New Hampshire

Apportionment statute. N. H. Rev. Stat., ch. 88-A:1 et seq. (adopted 1959). In *In Re William G. Barnhart Estate*, 120 N.H. 519, 162 A. 2d 168 (1960), to which the later enactment was not applicable, a widow electing against the will was exonerated from the Federal estate tax notwithstanding the local statute granted her a share of the personal estate "remaining after the payment of debts and expenses of administration," it being determined that the tax was neither.

New Jersey

Apportionment statute dealing with nonprobate assets. N. J. Stat. Ann., Tit. 3A, sec. 25-30 et seq. (adopted in 1950 and amended in 1951). Provides that nothing therein "shall be taken to require an apportionment of an estate tax inter sese among the legatees, devisees and beneficiaries under a will or among those who would take as the next-of-kin and heirs-at-law of a person dying intestate."

In *Dodd v. United States*, 223 F. Supp. 785 (D.C. N.J. 1963), *aff'd* 345 F. 2d 715 (3 Cir. 1965), the residue of an estate was divided equally between the surviving spouse and the surviving issue. On the point whether the widow's one-half share of the residue should be burdened by an estate tax, the courts ruled to the contrary, the United States Court of Appeals stating that it had "no doubt" that New Jersey would intend its citizens to have the full benefit of the "geographic equalization" which Congress provided for by establishing the marital deduction.

See also *Gesner v. Roberts* (N.J. Sup. Ct., 1967) CCH Inheritance, Estate and Gift Tax Reporter, State, Current, ¶ 20,017.

New Mexico

No apportionment statute. In *Re Gallagher's Will*, 57 N.M. 112, 55 P. 2d 317, 37 A.L.R. 149 (1953), the court

adopted the principle of equitable apportionment among all assets, probate and nonprobate, generating the Federal estate tax. While the marital deduction was not involved, the rationale of the decision would treat the widow's portion to the extent qualifying for the marital deduction as bearing no part of the tax.

New York

Apportionment statute. N. Y. Dec. Est. Law, sec. 124 (adopted 1930). Renouncing widow's share to the extent it qualifies for the marital deduction is exonerated from the Federal estate tax. *In Re Wolf's Estate*, 307 N.Y. 280, 121 N.E. 2d 224 (1954).

North Carolina

Apportionment statute (limited to share of renouncing widow). Gen. Stat. of N. Car., Vol. 2A, sec. 30-3 (adopted 1953).

In *Buffaloe v. Barnes*, 226 N. Car. 313, 38 S.E. 2d 222 (1946), the court ruled against the doctrine of equitable apportionment. In *Wachovia Bank and Trust Co. v. Green*, 236 N. Car. 654, 73 S.E. 2d 879 (1953), the court ruled that where a widow elected against the will the amount she took was reduced by Federal estate tax on the ground that the "surplus of the estate" in which she participated was an amount left after the payment of debts which included the tax.

Obviously to overcome the *Wachovia* decision, the North Carolina legislature in 1953 provided that where a widow dissented from the will and there were no children the widow receives one-half of the surplus free of any Federal estate tax. See *Tolson v. Young*, 260 N. Car. 506, 133 S.E. 2d 135 (1963).

North Dakota

Uniform Estate Tax Apportionment Act (S. D. 192, Laws of 1967).

Ohio

No apportionment statute.

Equitable apportionment of Federal tax applied against nonprobate assets in *McDougall v. Central National Bank of Cleveland, Trustee*, 157 Ohio St. 45, 104 N.E. 2d 441 (1952). In *Miller v. Hammond*, 156 Ohio St. 475, 104 N.E. 2d 9 (1952), a widow electing under the statute was held to take her share before any Federal estate tax under the court-applied rule of equitable apportionment in which it relied on *Lincoln Bank & Trust Co. v. Huber*, 240 S.W. 2d 89 (Ky. 1951). Thereafter, in *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E. 2d 695 (1954), the *Miller* case was overruled. The basis *was not* that the concept of equitable apportionment should not be followed, but that an Ohio statute was alleged to be inconsistent therewith under the facts involved (i.e., that an electing widow was limited to a maximum of one-half of the "net estate" in the determination of which Federal taxes must be deducted). Judge (now Justice) Stewart strongly dissented on the basis of the marital deduction provision in the Federal estate tax law.

In *Weeks v. Vandever*, the Probate Court of Cuyahoga County, Ohio, on April 22, 1966, deemed the rule in *Campbell v. Lloyd*, *supra*, as being inapplicable to a widow electing against the will where the language of a "tax clause" therein was sufficiently broad to exonerate her share from tax. See CCH Inheritance Estate and Gift Tax Reporter (State Current) para. 19,946.

Oklahoma

Apportionment statute. Okla. Stat. Ann., Vol. 58, sec. 2001 et seq. (adopted 1965).

Prior thereto the courts of Oklahoma rejected the doctrine of estate tax apportionment without the aid of the statute. In *Re Retten Meyer's Estate*, 345 P. 2d 872 (1959)

and see *Thompson v. Wiseman*, 233 F. 2d 734 (10 Cir. 1956). The same principle was adopted in *Tapp v. Mitchell*, 352 P. 2d 900 (1960) wherein such tax was treated as an expense of administration.

Oregon

Apportionment statute (limited to widow electing against the will and provides that to the extent her share qualifies for the marital deduction under the Federal estate tax law it is free of estate tax). Ore. Rev. Stat. sec. 113.050 (adopted in 1963).

Beatty v. Cake, 387 P. 2d 355 (1963) adopted equitable apportionment against nonprobate assets.

Pennsylvania

Apportionment statute. Pa. Stat. Ann., Tit. 20, sec. 881 et seq. (adopted 1937; revised 1951 to expressly cover marital deduction allowance).

Prior to legislation the Pennsylvania rule adopted by lower courts was against apportionment (*Newton's Estate*, 74 Pa. Super. 361 (1920)). *Estate of G. F. Uber*, 29 D & C 341 (1937), *aff'd* on other issues, 330 Pa. 417, 199 A. 356 (1938), but in *In Re Mellon's Estate*, 347 Pa. 520, 32 A. 2d 749, 757 (1943), the Supreme Court of Pennsylvania, noting that the "equitable principle of contribution" has long been enforced in the Commonwealth on principles of natural justice, rejected the lower courts' decisions and, with reference to the 1937 Apportionment Act, stated that the apportionment there involved "could be sustained either under the terms of the statute or upon the broad principle of equity here discussed."

In *In Re Rosenfeld's Estate*, 376 Pa. 42, 101 A. 2d 684 (1954), the Apportionment Act was construed to exempt from the Federal estate tax a widow's intestate share which qualified for the marital deduction provision of the Federal statute.

Rhode Island

No apportionment statute dealing with the Federal estate tax. Apportionment of the State estate tax provided for. Gen. Laws of R. I. Ann. sec. 44-23.21-22.

The general rule in Rhode Island is that the Federal estate tax is payable out of the residuary estate in the absence of direction to the contrary, but the courts have applied the doctrine of equitable apportionment thereof with respect to nonprobate assets. *Hooker v. Drayton*, 69 R.I. 290, 33 A. 2d 206 (1943); *Industrial Trust Co. v. Budlong*, 76 A. 2d 600 (1950).

South Carolina

No apportionment statute. Rule of equitable apportionment applied against nonprobate assets. *Myers v. Sinkler*, 235 S. Car. 162, 110 S.E. 2d 241 (1959).

Wife's intestate share also free of any Federal tax. *Pitts v. Hamrick*, 228 F. 2d 486 (4 Cir. 1954). See also *Smith v. United States*, 59-2 U.S.T.C. 11,907 (D.C. S. Car. 1959).

South Dakota

Apportionment statute. Chapter 196, Laws of 1961 (CCH Inheritance Estate and Gift Tax Reporter (State) p. 55,122).

Prior thereto courts refused to adopt the doctrine of equitable apportionment as to probate assets and held that the tax was properly charged against the residue of the estate. *Estate of Dellephine Burns*, 100 N.W. 2d 399 (1960).

Tennessee

Apportionment statute. Tenn. Code Ann. sec. 30-1117 (adopted 1943).

Prior thereto, under *Hutchinson v. Montgomery*, 112 S.W. 2d 827 (1938), equitable apportionment was denied on the basis that the Federal law placed the tax burden on the residue of the estate.

Texas

No apportionment statute. *Thompson v. Thompson*, 236 S.W. 2d 779 (1951) and *Sinnett v. Gidney*, 322 S.W. 2d 507 (1959) hold no apportionment of Federal estate tax within the probate estate, the tax being paid from the residue. The second decision left open the question of equitable apportionment against nonprobate assets.

Utah

No apportionment statute; no decisions found bearing on the point.

Vermont

No apportionment statute; no decisions found bearing on the point.

Virginia

Apportionment statute. Va. Code sec. 64-151 et seq. (adopted 1946). In 1952 the statute was amended to provide that such did not apply with respect to the benefit of the marital deduction allowable. In 1954 the statute was again amended to omit the latter limitation. Accordingly, no Federal estate tax is apportionable against the marital deduction allowance.

Washington

No apportionment statute. Federal estate tax is payable from the residue of the estate. *Seattle First National Bank, Executors, et al. v. Bank of California*, 138 Wash. Dec. 381, 230 P. 2d 297 (1951) and *Estate of M. Williamson*, 138 Wash. 247, 229 P. 2d 312 (1951).

West Virginia

Apportionment statute. W. Va. Code sec. 4162(1) (adopted in 1959).

Prior thereto the courts followed the rule against equitable apportionment and placed tax burden on residuary estate. *Cuppett v. Neilly*, 105 S.E. 548 (1958) and *Guaranty National Bank v. Mitchell*, 111 S.E. 2d 494 (1959).

Wisconsin

No apportionment statute. Adopted rule of no apportionment against nonprobate assets. *In Re Joas' Estate*, 16 Wisc. 2d 489, 114 N.W. 2d 831 (1962). Widow electing against will must bear proportionate burden of estate tax since such tax must be set off in determining the "net estate" in which she shared. *In Re Uihlein's Will*, 264 Wisc. 362, 59 N.W. 2d 641 (1953).

Wyoming

Apportionment statute. Wyo. Stat. sec. 2-336 et seq. (adopted 1959).

BRIEF FOR THE APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR AND THE RIGGS NATIONAL BANK OF
WASHINGTON, D.C., AS EXECUTORS OF THE ESTATE OF
CHARLES DELMAR, DECEASED, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE ORDER AND JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals

for the District of Columbia Circuit

FILED SEP 19 1967

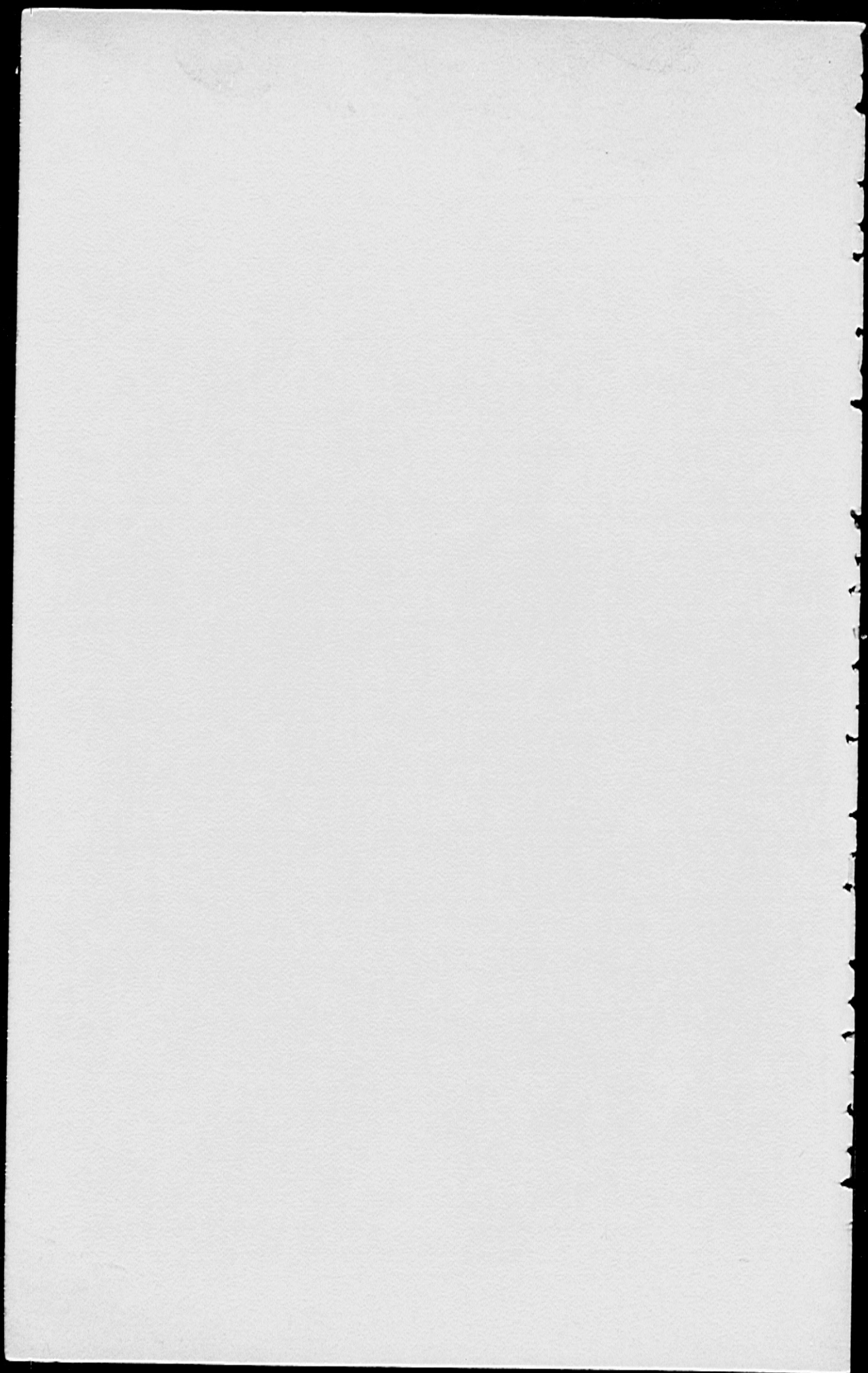
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STATEMENT OF QUESTION PRESENTED

In the opinion of the appellee the question is:

Whether the court below correctly sustained the determination of the Commissioner of Internal Revenue that the share of the decedent's probate assets distributable to his surviving spouse under the laws of the District of Columbia was one third of the balance or surplus of such probate assets remaining after deducting therefrom funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes, and that only such distributable share thus computed plus the widow's statutory allowance of \$500, less the District of Columbia inheritance taxes thereon, qualified for the marital deduction within the purview of Section 2056 of the Internal Revenue Code of 1954.

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| D. In view of the absence of any statute or law in the District of Columbia (1) which apports the decedent's federal estate tax among the beneficiaries of his estate or (2) which exonerates the share of his probate assets to which his surviving spouse is entitled under her election from any impact of the federal estate tax, it is obvious that the Congress intended that such tax is to be paid out of decedent's probate assets before any distribution of any portion thereof is made to his surviving spouse..... | 18 |
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The court below correctly sustained, etc.—Continued

E. It is the intention of the Congress, etc.—Continued

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- (a) The Congress in amending Section 18-211 of the District of Columbia Code (1961 ed.) on September 14, 1961, manifested its intention that the meaning of surplus probate assets which has always appeared in the District of Columbia Code is identical with the meaning of net probate assets of a decedent or intestate..... 30
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Argument—Continued

The court below correctly sustained, etc.—Continued

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F. There is no merit to taxpayer's contention that the Congress, in enacting the marital deduction provisions in 1948 "implicitly expected" (Br. 30) that this Court, by judicial fiat, "must adopt a [so-called] rule of equitable apportionment of the [federal estate] tax" (Br. 5) in order to free from any impact of the federal estate tax the share of the distributable surplus of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703 of the District of Columbia Code (1961 ed.)-----

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1. Taxpayer's contention that it was the intention of the Congress that the settled application of the statutes of descent and distribution should by judicial fiat be modified by this Court as a result of the enactment of the marital deduction provisions, to the end that a surviving spouse's share of the probate assets of her deceased husband to which she is entitled under Section 18-703 of the District of Columbia Code (1961 ed.) should be free from any impact of federal estate taxes, (and thereby increasing the amount of the allowable marital deduction) in order that "the purpose of the Congress [in enacting such deduction] will [not] be thwarted" (Br. 34), is devoid of any merit.-----

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2. Contrary to taxpayer's contention, Section 2056(b)(4) of the Internal Revenue Code of 1954 negates and disclaims any intention on the part of Congress that the one-third of the surplus of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703 of the District of Columbia Code should escape any impact of any federal estate tax.-----

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3. Taxpayer's contention (Br. 20, 24) that with the enactment of the marital deduction provisions in 1948 the Congress expressly provided that the surviving spouse, in the case of intestacy or election against the will of a testate decedent should take her statutory share free of any estate tax merely because her distributable share under the descent and distribution statutes of the states qualifies for the marital deduction is devoid of any merit and flies in the face of the *ratio decidendi* in the opinions of the Supreme Court in *Y.M.C.A. v. Davis* and *Harrison v. Northern Trust Co.*-----

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 68. The sixty-eighth part is a list of index.
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 71. The seventy-first part is a list of figures.
 72. The seventy-second part is a list of tables.
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 96. The ninety-sixth part is a list of tables.
 97. The ninety-seventh part is a list of appendices.
 98. The ninety-eighth part is a list of footnotes.
 99. The ninety-ninth part is a list of glossary.
 100. The hundredth part is a list of index.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR AND THE RIGGS NATIONAL BANK OF
WASHINGTON, D.C., AS EXECUTORS OF THE ESTATE OF
CHARLES DELMAR, DECEASED, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE ORDER AND JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

COUNTERSTATEMENT OF CASE

This is an appeal by the Estate of Charles Delmar, deceased (hereinbelow sometimes referred to as taxpayer) from the Order and Judgment of the United States District Court for the District of Columbia (JA 13), in which that court "dismissed with prejudice" the action of taxpayer praying for a refund of federal estate taxes in the amount of \$355,942.82 plus interest. JA 4-7.)¹

The ultimate question which this appeal presents to this Court for decision is whether the court below correctly sustained the determination of the Commissioner of Internal Revenue that under Section 2056 of the Internal Revenue Code of 1954 the allowable marital deduction from the statutory gross estate of Charles Delmar, deceased (hereinbelow some-

¹ It should parenthetically also be pointed out that taxpayer has asserted that a reversal by this Court of the judgment of the court below would "automatically give rise to a refund of District of Columbia estate tax" (JA 45) in an amount estimated to be about \$77,000.

times referred to as decedent) was only \$1,727,174.17 (JA 41) instead of \$2,413,769.26, as contended for by the taxpayer (JA 22).

Because of (1) the decedent's surviving spouse's renunciation of the devises and bequests to her under decedent's will, and (2) of her election "to take in lieu thereof my [her] legal share of the real and personal property" of decedent (JA. 46), the adjudication of this "ultimate question" herein presented to this Court for decision is dependent upon a determination of the amount of the distributable share of the probate assets which the surviving spouse is entitled to receive under the laws of the District of Columbia, including Sections 18-101, 18-211, 18-530, 18-701 and 18-703 of the District of Columbia Code (1961 ed.), as amended on September 14, 1961.² (Appendix, *infra*).

And this determination of the amount of the distributable share of the probate assets which the surviving spouse is en-

² Section 18-101 as pertinent provides that under the laws of descent and distribution, "such surviving spouse and kindred shall take as tenants in common" "the surplus personal property of * * * intestate" "according to the laws of the District of Columbia now or hereafter in force relating to the distribution of the personal property of intestates" and the "real property [of intestate] shall be liable, in the event of insufficiency of the personal property, for the payment of the intestate's funeral expenses, debts, costs of administration, and estate * * * taxes in the same manner and to the same extent as the personal property of such intestate". (Appendix, *infra*).

Section 18-211 (a) as pertinent empowers a surviving spouse to make such renunciation and election within six months after the death of the deceased spouse. Section 18-211 (e) as pertinent provides that the distributable legal share of the surviving spouse in the probate assets of the decedent is the same as she "would have taken had the deceased spouse died intestate", and in no "event shall the surviving spouse be entitled to more than one-half of the *net* estate bequeathed and devised by said will". (Emphasis supplied.) (Appendix, *infra*).

Section 18-530 as pertinent provides that when "all the claims against, or debts of, the decedent which have been known by or notified to him [the "executor or administrator"] have been discharged * * *, it shall be his duty to deliver up and distribute the *surplus or residue* of the personal estate not disposed of by any will, as herein directed". (Emphasis supplied.) (Appendix, *infra*).

Section 18-701 as pertinent provides that "When the debts of an intestate * * * shall have been discharged * * *, the administrator shall proceed to make distribution of the *surplus* as provided in this chapter". (Emphasis supplied.) (Appendix, *infra*).

Section 18-703 as pertinent provides that "If there be a widow * * * and a child * * *, the widow * * * shall have one-third only [of such surplus]". (Appendix, *infra*).

titled to receive under District of Columbia law is in turn dependent upon the resolution of a very narrow and restricted question, to wit, whether, under the laws of the District of Columbia, the legal share of the decedent's probate assets which is distributable to his surviving spouse is, as contended by the Government, one third of the balance, residue or surplus of these probate assets remaining *after* deducting therefrom funeral expenses, debts, claims and all administration expenses, *including* federal and District of Columbia estate taxes, or, as contended by the taxpayer, one third of the balance, residue or surplus remaining *prior* to the deduction of such items. The court below, in granting the Government's cross-motion for summary judgment and in denying the taxpayer's motion for such judgment and in dismissing "with prejudice" taxpayer's action (JA 13), answered this narrow and restricted question against the contentions of the decedent's estate.

The facts are not in controversy.

On August 17, 1963, the decedent, Charles Delmar, a domiciliary of the District of Columbia, died testate,³ survived by a son of a previous marriage and a wife of a subsequent marriage. (JA 14, 29; Br. 2.)⁴ Since January 20, 1964, the decedent's son, Roland H. Del Mar, and the Riggs National Bank of Washington, D.C., have been the executors of his estate. (JA 14-15.)

On November 16, 1964, these executors filed the federal estate tax return for the Estate of Charles Delmar. (JA 15-16.) As reported thereon, the value of the decedent's statutory gross estate was \$8,271,593.50⁵ (JA 40), broken down as follows (JA 34-35, 38):

Real Estate.....	\$189,504.00
Stocks	7,349,923.79
Bonds	51,990.17
Cash	627,112.30
Note	6,250.00
Accrued Interest.....	92.89
Miscellaneous Property.....	11,516.35

³ The decedent executed his will on December 12, 1957 (JA 30), and republished it by his first codicil thereto on October 31, 1958, and again by his second codicil thereto on April 26, 1961 (JA 31, 32).

⁴ The symbol "Br." refers to the brief of the taxpayer.

⁵ Upon audit, it should be noted that the District Director of Internal Revenue increased the value of the decedent's statutory gross estate as reported on the federal estate tax return by \$17,992. (JA 41.) The correctness of this increase is not involved in the instant appeal.

Insurance ----- \$35,204.00

Total statutory gross estate ----- *8,271,593.50

Two and one half months after the death of decedent, to wit, on November 1, 1963, the surviving spouse of decedent did "*renounce and quit* all claim to any devise or bequest made to me [her] by the last Will of my [her] husband" and did "*elect to take* in lieu thereof my [her] *legal share* of the real and personal property of my said spouse [the decedent]." (Emphasis supplied.) (JA 46.)

As a result of such renunciation and election, the executors of the Estate of Charles Delmar, deceased, as disclosed by the federal estate tax return which they filed on November 16, 1964 (JA 15-16, 33-40), some fifteen months after the death of decedent, did distribute to decedent's surviving spouse her "legal share of the real and personal property of my [her] said spouse." The legal share of the decedent's probate assets which the executors distributed to the decedent's surviving spouse was one-third of the balance or surplus of these probate assets, remaining *after* deducting therefrom funeral ex-

* As thus reported on the federal estate tax return, the value of the non-probate assets constitutes about one half of one percent of the value of the decedent's statutory gross estate. The value of the real property, which is part of the probate assets of decedent, constitutes about 2.3 percent of the value of the decedent's statutory estate. And the value of the personal property which is also part of the probate assets of decedent constitutes more than 97 per cent of decedent's statutory gross estate.

¹ In paragraph (3) of his will the decedent had devised and bequeathed to his surviving spouse their home and the furnishings therein. (JA 28-29.) In paragraph (4) thereof he created a spendthrift testamentary trust whose corpus consisted solely of personal property, granting her the income for life with a limited power of appointment. (JA 31.) The value of the corpus of such testamentary trust was to be arrived at in accordance with the provisions of the first sentence of paragraph (4) of the will, which provides as follows (JA 29):

"(4) I give and bequeath to my trustees so much of my personal property as, when increased by the real and personal property devised and bequeathed to my wife, Jacqueline Delmar, by Paragraph (3) hereof, may be equal to one-third of the sum of (a) all personal property distributable by my executors under this will, after the payment of all funeral expenses, expenses of administration of my estate, and debts of my estate (including all estate and inheritance taxes payable by my executors under Paragraph (14) hereof), and (b) all real property owned by me at the time of my death."

Paragraph (14) provided (JA 30):

"(14) My executors *shall pay out* of my *residuary* estate (without any right of reimbursement) *all estate, inheritance, and succession taxes*, and all other governmental charges which may be assessed against any gift made by me under this will * * *." (Emphasis supplied.)

penses, debts, claims, and all administration expenses, including federal and District of Columbia estate tax. (JA 22, 38, 40.) Such method of arriving at the distributable "legal share" under the laws of the District of Columbia was also followed and approved by the District Director in his audit of the federal estate tax return in his determination of the federal estate taxes of the Estate of Charles Delmar (JA 41),⁸ and it was sustained by the court below (JA 13).

Subsequently the executors filed a claim for refund of federal estate taxes. (JA 42-44.) Therein they contended that their original method and the District Director's method of computing the surviving spouse's distributable legal share of decedent's probate assets were wrong, on the ground that under the laws of the District of Columbia, the surviving spouse's distributable "legal share of the real and personal property of [decedent]" "should not be [have been] reduced for either the Federal or District of Columbia estate tax."⁹ (JA 44.)

In denying this claim for refund the District Director stated (JA 41):

The claim for refund in the amount of \$367,998.58 filed on June 25, 1965, with respect to the above estate has been disallowed. Decedent's spouse's share of the estate is to be computed after the deduction of Federal and District of Columbia estate taxes. *Herson v. Mills*, Dist. Ct. D.C., 221 Fed. Supp. 714 (1963).

In open court below, in support of its motion for summary judgment in which it had averred that the decedent's surviving

⁸The District Director upon audit slightly increased the value of decedent's statutory gross estate and slightly decreased the claimed administration expenses. (JA 41.) None of these adjustments are now being contested in this Court. These adjustments resulted in a federal estate tax deficiency in the amount of \$7,015.29 plus interest, which the executors paid on August 25, 1966. (JA 6, 9.) Also as a result of these adjustments the District Director increased the allowable marital deduction from \$1,725,725.58, as reported on the federal estate tax return (JA 37-38, 40), to \$1,727,174.17 (JA 41).

⁹The decedent's surviving spouse could not, of course, have joined in this claim for the refund of federal estate taxes. But it may also be pointed out that the record does not disclose that any action was undertaken by the decedent's surviving spouse against the executors for an additional payment to her of an amount equal to her share of federal and District of Columbia estate taxes, i.e., about \$720,099.27. (JA 41.) Of course, on the other hand, as a result of their claim for refund, the executors are, in effect, for the first time contending that they had neglected to distribute such sum to the decedent's surviving spouse.

spouse "takes her statutory share of the estate free of any Federal or District of Columbia estate tax" (JA 11), the taxpayer contended that *Herson v. Mills* (which was cited by the District Director in support of his rejection of taxpayer's claim for refund and which is incontrovertibly on all fours with the instant case (Br. 7)) was wrong and should not be followed, stating (JA 49):

I was very happy that the motion was heard by you, because I felt that if any Judge on the District Court would reverse *Henson* [sic] versus *Mills*, then it would be its author.

As noted, the court below, however, denied taxpayer's motion for summary judgment and granted the Government's cross-motion for summary judgment.¹⁰ (JA 13, 52.)

No opinion was written by the court below. However, by its Order and Judgment (JA 13), it is plain that the court below did *not* reverse its decision in *Herson v. Mills*, 221 F. Supp. 714, in which, upon basically identical facts,¹¹ it observed (pp. 715, 716):

The federal estate tax being in the nature of an administration expense is taken from the estate before the property is set off to the beneficiaries.

* * * the federal estate tax * * * is a lien on the decedent's estate *before* distribution and the executors are liable for its payment. (Emphasis supplied.)

The intent of Congress was that the federal estate tax should be paid out of the estate as a whole * * * where the *law of the jurisdiction* provides [not] otherwise the burden of the federal estate tax rests, like other

¹⁰ Immediately after Judge Matthews, sitting as the court below, who was the author of the opinion in *Herson v. Mills*, had ruled, "I will have to deny your motion [for summary judgment], Mr. Brown," the following colloquy took place (JA 48):

"Mr. Brown: Well Your Honor, have you reached that decision without reading the briefs?

"The Court: I have read the briefs; I read them before today.

"Mr. Brown: I see, Your Honor.

"Well, if the Court please, I didn't expect much to the contrary—I will be perfectly frank with you."

¹¹ In taxpayer's sole reference in its brief to *Herson v. Mills*, *supra*, taxpayer boldly brushes it aside only by asserting that it does "recognize that the issue here presented, in essence, was resolved adversely to them [it] in *Herson v. Mills*." (Br. 7.)

administration expenses, on the general estate and is not apportioned among the beneficiaries of the estate. (Emphasis supplied.)

* * * there is *no* provision in the federal estate tax law or in *any law of this jurisdiction which* apportions the federal estate tax, among the beneficiaries of a decedent's estate or *exempts* the widow's share from liability. (Emphasis supplied.)

Thus, the court in *Herson v. Mills* held that an "interest [in property] passing from the decedent to the surviving spouse" under the laws of descent and distribution of the District of Columbia, which qualifies for the marital deduction within the meaning of the federal estate tax law, is "not absolve[d] * * * from contribution to the [federal estate] tax ultimately imposed" (p. 715).

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the statutes and other authorities herein involved are set forth in the Appendix, *infra*.

SUMMARY OF ARGUMENT

The widow of Charles Delmar, who died in 1963 with probate assets in excess of \$8,000,000, renounced his will and elected to take her share of the decedent's property under the statutes of descent and distribution of the District of Columbia. The statutes of descent and distribution as enacted in the Maryland Laws of 1789 provided that whenever an intestate is survived by a spouse and a child, his surviving spouse was entitled to receive one-third of the "surplus" of his personal property. Such law was also the law of the District of Columbia from the date of its creation and was incorporated by the Congress in the Code of the District of Columbia in 1901. Accordingly the interpretation of these provisions by the Court of Appeals of Maryland has been deemed to be of persuasive authority in this Court.

The Congress in 1957 amended the Code of the District of Columbia (1951 ed.) and therein provided that such surviving spouse's interest, instead of being restricted to one-third of the surplus personal property of the decedent was expanded to include one-third of the surplus assets of the intestate which

included both the intestate's personal property and his real property.

The Congress on September 14, 1961, again amended the statutes of descent and distribution as codified in the D.C. Code (1961 ed.) which included the 1957 amendments. As thus amended the statutes of descent and distribution expressly provide that in the event that the personal property of the intestate were not sufficient "for the payment of the intestate's funeral expenses, debts, costs of administration, and estate * * * taxes" then the real property of the intestate would be called upon for such payment "in the same manner and to the same extent as the personal property of such intestate".

In 1965, the Congress re-codified that portion of the D.C. Code entitled "Decedents' Estates and Fiduciary Relations" which includes the statutes of descent and distribution. Its purpose was not "to make any substantive changes in the law" but "to reflect in those changes only what apparently was the legislative intent, or is implied in the provisions themselves, or has been stated by the courts in construing the sections."

The modern Federal Estate Tax Act was enacted in 1916 and it expressly provides that the federal estate tax is in effect a preferred charge against the intestate's gross estate, being a lien which attaches to such gross estate at the precise moment of the death of the decedent. This Court, the Court of Appeals of Maryland and other courts throughout the United States have treated and considered the federal estate tax of an intestate as being an expense of administration or debt of the decedent. It is the settled law of the District of Columbia, of Maryland and of other states that the "surplus" of the probate assets of an intestate which are distributable under the statutes of descent and distribution is the balance of the intestate's personal property or personal and real property, remaining after deducting therefrom the intestate's funeral expenses, debts, and costs of administration including the federal estate tax.

Accepting such settled law, the Congress in its role as the legislative body for the District of Columbia has not seen fit to enact any apportionment statutes for the District of Columbia which would in anywise apportion federal estate taxes among the various beneficiaries of the intestate. Congress was not without the knowledge that the Supreme Court in 1942 had declared the states were empowered to enact apportionment

statutes which could apportion federal estate taxes among the beneficiaries of an intestate.

The Congress in 1948 amended the Federal Estate Tax Act by allowing the estate of an intestate to take as a marital deduction from his gross estate the value of the property of the intestate which passed from him to his surviving spouse, not exceeding one-half of his adjusted gross estate. Neither this 1948 amendment, nor any other provision of the federal estate tax statute provides for the exoneration from the impact of the federal estate tax of that property of the intestate which had passed from him to his surviving spouse under the statutes of descent and distribution.

However, as a result of the power resting in the states to enact apportionment statutes which in effect modify the application of the statutes of descent and distribution, many states have enacted a variety of inconsistent and differentiating apportionment statutes. Some states interestingly enough expressly provided that when a surviving spouse renounces her deceased spouse's will and elects to take a share of his probate assets under the statutes of descent and distribution, in no event, is that share of his probate assets which she so receives free from any impact of any federal estate tax.

By not enacting for the District of Columbia any apportionment statute and by re-enacting as recently as 1965 the statutes of descent and distribution which as here pertinent, have been in existence since 1789, Congress incontrovertibly has established the public policy for the District with respect to the devolution of property of an intestate. Some 21 states similarly have *not* enacted any apportionment statutes. However, taxpayer nevertheless contends that this Court should, by judicial fiat, create public policy in this area of the devolution of property of an intestate and thereby assume the prerogatives of the Congress by declaring a rule of law which would in effect adopt the identical public policy inherent in some of the apportionment statutes adopted by some states. Courts generally have avoided creating such public policy by judicial fiat. Thereafter some of these states enacted apportionment statutes.

It is incontrovertible that in recodifying the statutes of descent and distribution in 1965 the Congress chose not to enact

any apportionment statute for the District, even though in 1963, the District Court of the District of Columbia in *Herson v. Mills* had expressly refused to create such rule by judicial fiat. No appeal was taken from that case. Its holding, however, was in accord with the settled law of the District of Columbia, namely that federal estate taxes are in the nature of administration expenses, and, as buttressed by the clarifying 1961 amendment to the District of Columbia Code, that federal and state taxes are deductible from the probate assets of the intestate *before* computing the "surplus" of the intestate probate assets which are distributable under the statutes of descent and distribution. The holding in this case is widely known and prior and subsequent thereto has been consistently followed and applied. This settled law was in fact followed by the executors of the estate of decedent when they filed the federal estate tax return. However, on claim for refund, the executors took a different position which has created the issue in the instant case.

In view of the foregoing, it is respectfully submitted that the court below properly refused, by judicial fiat, to create a rule of law (embodying the gist of the apportionment statutes of some states), which would free the share of a widow which she had received under the statutes of descent and distribution (after renouncing her husband's will) from any impact of the federal estate tax. Accordingly, the court below was correct in granting the Government's cross-motion for summary judgment, and its judgment sustaining the determination of the Commissioner that the allowable marital deduction from the statutory gross estate of the decedent is only one-third of the "surplus" or balance of decedent's probate assets remaining *after* deducting therefrom the decedent's funeral expenses, debts and all expenses of administration including federal and District of Columbia estate taxes (plus \$500 widow's allowance, less the succession taxes imposed thereon by the District) should be affirmed.

ARGUMENT

The court below correctly sustained the determination of the Commissioner of Internal Revenue that, under the law of the District of Columbia, the share of the decedent's probate assets distributable to his surviving spouse was one-third of the balance or surplus of these probate assets remaining after deducting therefrom funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes, and that only such distributable share plus the widow's statutory allowance of \$500, less the District of Columbia inheritance taxes thereon, qualified for the marital deduction within the purview of Section 2056 of the Internal Revenue Code of 1954

It is the position of the Government that the court below correctly sustained the determination of the Commissioner of Internal Revenue that, under the law of the District of Columbia, the share of the decedent's probate assets distributable to his surviving spouse was one-third of the balance or surplus of these probate assets remaining after deducting therefrom funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes, and that only such distributable share plus the widow's statutory allowance of \$500, less the District of Columbia inheritance taxes thereon, qualified for the marital deduction within the purview of Section 2056 of the Internal Revenue Code of 1954, Appendix, *infra*.

A. The federal estate tax (which is an excise tax upon the happening of an event, namely death, where the death brings about certain described changes in legal relationships affecting decedent's property) does not tax the interest in decedent's property to which legatees and devisees succeed at death, but taxes solely the decedent's interest in property which had ceased by reason of his death

It is settled law that the federal estate tax "is not levied upon the property of which an estate is composed. It is an excise tax imposed upon the *transfer* of or *shifting* in relationship to property at death". (Emphasis supplied.) *U.S. Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939). Or, as stated in *Tyler v. United States* 281 U.S. 497, 502 (1930), it is "A tax laid upon the happening of an event, as distinguished from its tangible fruits, * * * the event is *death* and the result which is made the occasion of the tax is *the bringing into being or the enlargement of property rights* * * *". (Emphasis supplied.) See also:

Fernandez v. Wiener, 326 U.S. 340, 352 (1945); *Estate of Roger v. Commissioner*, 320 U.S. 410, 413-414 (1943); *Whitney v. Tax Commission*, 309 U.S. 530, 539 (1940).

This Court in *Hepburn v. Winthrop*, 65 U.S. App. D.C. 309, 314, 83 F. 2d 566, 571 (1936), in accordance with such settled law, held:

The [federal estate tax] statute does not tax the property, but the privilege of transfer. What was really imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties, as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeed on death, but the interest which ceased by reason of death. *Young Men's Christian Ass'n v. Davis*, 264 U.S. 47-50, 44 S. Ct. 291, 292, 68 L. Ed. 558.

And the District Court in *Herson v. Mills*, 221 F. Supp. 714 (D.C.D.C. 1963), citing *Hepburn*, *supra*, properly held (p. 715):

In general the federal estate tax is a levy imposed upon the transfer of property at death. It is not an inheritance or succession tax, that is, it is not a tax on what devisees, legatees, beneficiaries, or heirs receive, but is a tax on the interest which is shifted or transferred by reason of the death of the owner.

B. The federal estate tax is a lien which is impressed and attaches to the decedent's gross estate at the precise moment of his death and at that time becomes an obligation of the decedent's estate without assessment

It is the position of the Government that the federal estate tax is a lien which is impressed and attaches to the decedent's gross estate at the precise moment of his death and at that time becomes an obligation of the decedent's estate without assessment.

The Congress has expressly provided that at the precise moment of the decedent's death, the federal estate tax of the decedent which is to be paid by his executor or administrator is a "lien for 10 years upon the gross estate of the decedent". Section 6324, Internal Revenue Code of 1954, Appendix, *infra*. The Supreme Court in *Detroit Bank v. United States*, 317 U.S.

329 (1943), in construing the predecessor identical statute, held (p. 332):

The [federal estate tax] lien attaches at the date of the decedent's death, since the gross estate is determined as of that date and the estate tax itself becomes an obligation of the estate at that time without assessment.

And the Court stated in *Fernandez v. Wiener*, 326 U.S. 340, 345 (1945), that "The revenue laws * * * providing [provide] that the [federal estate] tax shall be a lien on all of the property included in the decedent's gross estate."

Furthermore, the Supreme Court in *Michigan v. United States*, 317 U.S. 338 (1943), in acknowledging "the effect of a lien for federal estate taxes under the supremacy clause of the Constitution," held (p. 340):

* * * it is not debatable that a tax lien imposed by a law of Congress * * * cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision [and] * * * could not be set aside by state legislation.

This Court in *Hepburn v. Winthrop*, *supra*, p. 314, 83 F. 2d, p. 571, in accordance with such settled law, held that the revenue laws of the United States require "the executor to make the [federal estate] tax return and to pay the tax and until paid, for ten years, the tax is a lien upon the gross estate". Similarly, the United States District Court for the District of Columbia in *Herson*, *supra*, citing *Hepburn*, *supra*, held (p. 715): "The [federal estate] tax is a lien on the decedent's estate before distribution and the executors are liable for its payment."

C. The federal estate tax due from the decedent's estate is of the nature of an administration expense under the law of the District of Columbia, and further, as a lien which at the precise moment of decedent's death had attached to decedent's probate assets, such tax constitutes a preferred general charge thereon which prior to distribution is to be paid out of the decedent's probate assets by the administrator or executor substantially as other taxes and charges are paid

It is the position of the Government that the federal estate tax due from the decedent's estate is of the nature of an administration expense under the law of the District of Columbia, and further that, as a lien which at the precise moment of decedent's death had attached to decedent's probate assets, such tax constitutes a preferred general charge thereon which

prior to distribution is to be paid out of the decedent's probate assets by the administrator or executor substantially as other taxes and charges are paid.

We have shown in Subdivision B of our brief, *supra*, that the federal estate tax is a lien which is impressed upon and is attached to the decedent's gross estate at the precise moment of his death and becomes an obligation of his estate without assessment. The Supreme Court in *United States v. Woodward*, 256 U.S. 632 (1921), held (p. 635):

It [the federal estate tax] is made a charge on the estate and is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid. It is made a general charge on the gross estate * * *.

This Court in *Hepburn v. Winthrop*, *supra*, held that the federal estate tax "is of the nature of an administrative expense." And in the recent case of *District of Columbia v. Payne*, — U.S. App. D.C. —, 374 F. 2d 261, 265, decided on December 22, 1966, this Court restated such holding as follows:

We held in *Hepburn v. Winthrop*, 65 App. D.C. 309, 83 F. 2d 566 (1936), 105 A.L.R. 310 that payment of the [federal] estate tax out of the personal residuary estate is similar to the payment of debts, and *thus an expense of the administration of the estate*. (Emphasis supplied.)

In restating such settled law, this Court also expressly rejected the contention of the taxpayer in *Payne* "that *Hepburn* has been overruled by the Supreme Court in *Riggs v. Del Drago*, 317 U.S. 95 (1942)." In this connection this Court stated (— U.S. App. D.C., p. —, fn. 4, 374 F. 2d, p. 264, fn. 4):

That case [*Riggs*] merely held that the federal estate tax should be paid out of the estate as a whole, and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal estate tax; also, in *Riggs*, it was the New York apportionment law that was involved.

It should here be stressed that the taxpayer in the instant case has in effect merely reiterated this identical contention which this Court in *Payne* had unequivocally rejected. In its

brief here, taxpayer contends in effect that *Riggs v. Del Drago*, 317 U.S. 95 (1942), has nullified * * * the decision of this Court, *Hepburn v. Winthrop*" (Br. 14), and notwithstanding the rejection of such contention by this Court in *Payne, supra*, insists that *Hepburn* "is predicated upon an erroneous concept of the law and should be appropriately reversed * * *." (Br. 7). The identical contention was made by taxpayer in open court below. It was there stated by counsel (JA 50): "I believe that *Hepburn* versus *Winthrop* was so undermined by *Riggs* versus *Del Drago* * * *." The court below, in rejecting such contention, stated (JA 50):

I don't see why you say that. All this case that you mentioned last [*Riggs*] decided was that New York could provide a method of apportionment.

It should be pointed out that the holding by this Court in *Hepburn*, was also cited in *Herson, supra*, and was even favorably cited in *Riggs* (p. 99, fn. 4), much less overruled. Furthermore, it should also be pointed out, that subsequent to the decision of the Supreme Court in *Riggs*, *Hepburn* has been favorably cited by many other courts throughout the nation.¹¹

Taxpayer in effect concedes that *Herson, supra*, which was also decided by Judge Matthews, sitting as the United States District Court for the District of Columbia, not only is on all fours with the case at bar but "was resolved adversely to them [it]." (Br. 7.) Taxpayer in its brief after quoting merely one sentence from the opinion in *Herson* (Br. 7) declares, *ex cathedra* and without further comment that *Herson* "rests upon an erroneous foundation" (Br. 5) because the court in *Herson* "In reaching its decision * * * relied upon *Hepburn v. Winthrop*" (Br. 7). The single sentence quoted from *Herson* (p. 7) was lifted out of context from a paragraph in the opinion in *Herson* which reads as follows (pp. 715-716):

The intent of Congress was that the federal estate tax should be paid out of the estate as a whole and

¹¹ *In re Estate of McLaughlin*, 52 Cal. Rptr. 543, 544, (1966); *Old Colony Trust v. McGowan*, 156 Maine 138, 144, 163 A. 2d 538, 542 (1960); *Lawless v. Lawless*, 17 Ill. App. 2d 481, 489, 150 N.E. 2d 646, 650 (1958); *Morrison v. Commissioner*, 24 T.C. 965, 971 (1955); *Clarke v. Weldon*, 204 Md. 28, 29, 102 A. 2d 560, 561 (1953); *In re Estate of Gelin*, 229 Minn. 516, 522, 40 N.W. 2d 342, 346 (1949); *In re Berger's Estate*, 183 Misc. 366, 368, 50 N.Y.S. 2d 550, 551-552 (1944); *Estate of Bauer*, 59 Cal. App. 2d 152, 158, 138 P. 2d 717, 720, (1943).

that the distribution of the remaining estate and the ultimate impact of the federal tax should be determined under the law of the place having the administration of the estate. *Riggs v. Del Drago*, 317 U.S. 95, 63 S. Ct. 109, 87 L. Ed. 106. It is a general rule that where neither the will of the decedent nor the law of the jurisdiction provides otherwise, the burden of the federal estate tax rests, like other administrative expenses, on the general estate and is not apportioned among the beneficiaries of the estate. Mertens' Law of Federal Gift and Estate Taxation, § 30.05, p. 652. The federal estate tax being in the nature of an administration expense is taken from the estate before the property is set off to the beneficiaries. The tax is not a payment as to which the beneficiaries have any concern as it is a charge against the estate and not the legatees or distributees. *Hepburn v. Winthrop*, 65 App. D.C. 309, 83 F.2d 566.

The principles set forth in the above excerpt from *Herson*, we respectfully submit, when read in relation to the incontrovertible law as summarized in the four paragraphs preceding the above quotation from the opinion of *Herson*, clearly support the holding of the court in that case that under the law of the District of Columbia, the widow therein (as in the case at bar), who had "renounced the will of her husband and elected to share in his estate as if he had died intestate" (p. 715), was entitled to one-third of the decedent's probate assets *only after* there had been deducted therefrom funeral expenses, debts, claims, and *all administration expenses, including the federal estate taxes*. Furthermore, this holding in *Herson* is in accord with the settled law of the District of Columbia as summarized in 3 Mersch, Probate Court Practice in the District of Columbia (2d ed.), Sec. 2487, which is as follows (p. 7):

§ 2487. *Claims of the United States, D.C. Taxes, Rent, Judgments*

After funeral expenses the fiduciary must next discharge obligations of the decedent due the United States. While Section 3456 R.S.U.S. expresses a preference to the Government over all creditors, that preference has been construed as subject to funeral expenses, on grounds of public policy. Next in order to be paid are

claims of the District of Columbia for taxes; the claim of a landlord for rent in arrears, for which an attachment might be levied at law; and then judgments and decrees of courts of the District of Columbia.¹²

¹² Such law as thus declared by this Court in *Hepburn* and followed in *Herson, supra*, and as summarized by *Mersch, supra*, has also generally been similarly declared and adopted by other courts. For instance, in *In re Glovers' Estate*, 45 Haw. 569, 584, 371 P. 2d 361, 369 (1952), that the court held:

"* * * the federal estate tax is an expense of administration."

Likewise, the Supreme Court of Illinois in *First National Bank of Chicago v. Hart*, 388 Ill. 489, 497, 50 N.E. 461, 464-465 (1943), held:

"This state has no provision in its laws relating to the incidence of the burden of Federal Estate tax and it must therefore fall directly upon the corpus of the estate and be considered an item of expense, such as debts, funeral expenses and the like."

To the same effect see *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 513-514, 101 N.E. 2d 604, 607 (1951); *Lawless v. Lawless*, 17 Ill. App. 2d 481, 490, 150 N.E. 2d 646, 651 (1958).

The Court of Appeals of Maryland in *Weinberg v. Safe Deposit & Trust Co.*, 198 Md. 539, 540, 85 A. 2d 50, 52 (1951), also held:

"The term 'surplus personal estate' as used in Section 314 under which the widow could become entitled to no more than \$2,000 and one-half of the surplus personal estate * * * necessarily is the balance after all expenses of administration and debts, including [federal] taxes, have been paid."

And in *Clarke v. Welden*, 204 Md. 26, 28, 102 A. 2d 560, 561 (1953), it was held:

"The federal estate tax is a deductible item in determining the amount of the distributive share."

The Supreme Court of Maine in *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 145, 163 A. 2d 538, 542 (1960) was of the same view. The court there held:

"The estate is regarded as being instantly depleted to the extent of the [federal estate] tax * * *. It seems certain that there can be no 'residue' for 'distribution' until after the depletion caused by the federal estate tax has occurred, and we are therefore constrained to construe the statutory phrase 'charges of settlement' as broad enough to include the federal estate tax as one of those charges."

Similarly in *Wachovia Bank and Trust Co. v. Green*, 236 N.C. 654, 660, 73 S.E. 2d 877, 883 (1953), the Supreme Court of North Carolina observed:

"The word 'debts' as used in statutes G.S. Sec. 28-105 prescribing the order of their payment would seem to include the federal estate tax."

And in *Campbell v. Lloyd*, 162 Ohio St. 203, 208, 122 N.E. 2d 695, 698 (1954), certiorari denied, 349 U.S. 911, rehearing denied, 349 U.S. 948, the court stated:

"* * * in determining the value of the succession of any * * * beneficiary the amount of the federal estate tax should first be deducted, like other debts and expenses of administration." (Emphasis supplied.)

In *In re Williamson's Estate*, 38 Wash. 2d 259, 267, 229 P. 2d 312, 317 (1951), it was also held:

"The Federal estate tax * * * is payable as an expense of administration."

The observations of the highest court of West Virginia in this connection

D. In view of the absence of any statute or law in the District of Columbia (1) which apportions the decedent's federal estate tax among the beneficiaries of his estate or (2) which exonerates the share of his probate assets, to which his surviving spouse is entitled under her election, from any impact of the federal estate tax, it is obvious that the Congress intended that such tax is to be paid out of decedent's probate assets before any distribution of any portion thereof is made to his surviving spouse

It is the position of the Government that in view of the absence of any statute or law in the District of Columbia (1) which apportions the decedent's federal estate tax among the beneficiaries of his estate or (2) which exonerates the share of his probate assets to which his surviving spouse is entitled under her election from any impact of the federal estate tax, it is obvious that the Congress intended that such tax is to be paid out of decedent's probate assets before any distribution of any portion thereof is made to his surviving spouse.

1. *It is clearly the Congressional purpose and intent that the federal estate tax should be paid by the executor or administrator of a testate or an intestate from the probate assets before making any distribution of the probate assets to beneficiaries under the will or under the descent and distribution statutes, unless such taxes are otherwise provided for in the will or apportioned under a pertinent state statute*

The Internal Revenue Code of 1954 and its precursors expressly provide that such "[federal estate] tax * * * shall be paid by the executor" (Section 2002 of the 1954 Code Appendix, *infra*), and that it is the Congressional "purpose and intent * * * that so far as is practicable and unless otherwise directed by the will of the decedent the [federal estate] tax shall be paid out of the estate *before* its distribution" (emphasis supplied) (Section 2205 of the Internal Revenue Code of 1954), Appendix, *infra*.

The constitutionality of the precursors of these statutes was attacked in *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921).

in *Guaranty National Bank v. Mitchell*, 144 W. Va. 828, 833, 111 S.E. 2d 494, 497 were no different from the others listed above. The court stated:

"Whether, however, the federal estate tax be considered a 'debt,' a 'claim,' or an 'administrative expense' the result is the same. It must * * * be deducted from the whole personal estate of inheritance, before computation of the distributive share of the widow, since no state statute requires a different result."

Likewise, in *In re Uihlein's Will*, 264 Wis. 362, 376, 59 N.W. 2d 641, 648 (1953) the Supreme Court of Wisconsin said:

"Federal estate taxes stand in no different category than do debts or administration expenses."

It was therein contended (p. 349) that if the federal estate "tax [is] attached to the estate before distribution" and "there is an intestacy" it could result in "inequalities in the amounts that beneficiaries might receive in case of estates of different values, of different proportions between real and personal estate, and of different numbers of recipients." In rejecting this quoted contention of the taxpayer in that case, the Supreme Court, in upholding the constitutionality of these provisions, stated (p. 349):

As to the inequalities in case of a will they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition he makes. *As to intestate successors* the tax is not imposed upon them *but precedes* them and the fact that they may receive less or different sums because of the [federal] statute does not concern the United States. (Emphasis supplied.)

This Court incorporated the above quotation into its opinion in *Hepburn, supra*, p. 315, 83 F. 2d, p. 572.

Subsequently, in 1924, the Supreme Court in *Y.M.C.A. v. Davis*, 264 U.S. 47, further clarified and amplified this "purpose and intent" of the Congress in enacting these provisions, stating (p. 50):

Congress was looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries. * * * It said to him [the testator] "if you will make such gifts [which qualify as deductions from gross estate], we'll reduce your death duties and measure them not by your whole estate but by that amount, less what you [so] give." In § 408 [of the Revenue Act of 1918, which was reenacted as section 2205 of the 1954 Code] it is declared to be the intent and purpose of Congress that as far as it is practicable and unless otherwise directed by the testator, *the tax is to be paid out of the estate before distribution*. (Emphasis supplied.)

Eighteen years later, the Supreme Court in *Riggs v. Del Drago*, 317 U.S. 95 (1942), cited with approval *New York Trust Co. v. Eisner, supra*, and *Y.M.C.A. v. Davis, supra*, as well as the decision of this Court in *Hepburn, supra*.

In *Riggs v. Del Drago*, *supra*, in footnote 4, p. 98, the Supreme Court quoted with approval a statement by Congressman Cordell Hull, one of the supporters of Section 208 of the 1916 Act (a precursor of Section 2205 of the 1954 Code quoted above) and its reputed draftsman as follows:

Under the general laws of descent the * * * [federal] estate tax would be *first* taken out of the net estate *before* distribution, and distribution made under the same rule that would otherwise govern it. Where the decedent makes a will * * * he can insert a * * * provision in his will, the effect of which would more or less change the incidence of the [federal estate] tax. (Emphasis supplied.)

And the Supreme Court in *Riggs* further observed (p. 98), as summarized by this Court in *District of Columbia v. Payne*, *supra*, — U.S. App. D.C., p. —, 374 F. 2d, p. 265, fn. 4, that it was the intent and purpose of the Congress that "the federal estate tax should be paid out of the estate as a whole and that the applicable state law as to the devolution of property at death [whether by state statute or by will] should govern the distribution of the remainder and the ultimate impact of the federal estate tax."

In *Riggs* it was contended that the New York apportionment law was "unconstitutional because in conflict with the federal estate tax law" (p. 96). The constitutionality of this New York apportionment law, which "provides in effect that except as otherwise directed by the decedent's will, the burden of any federal death taxes shall be spread proportionately among the distributees or beneficiaries of the estate" (p. 98), was in *Riggs* sustained by the Supreme Court. It held (p. 102):

Since ¶ 124 of the New York decedent estate law is not in conflict with the federal estate tax statute, it does not contravene the supremacy clause of the Constitution. Nor does the fact that the ultimate incidence of the federal estate tax is governed by state law violate the requirement of geographical uniformity.

Such is the limited, restricted and narrow holding of the Supreme Court in *Riggs*. "It did not undertake in any manner to specify who was to bear the burden of tax." *Weinberg v. Safe*

Dep. & Trust Co., 198 Md. 539, 545, 85 A. 2d 50, 52 (1951). It did not in any wise defeat the application of the statutes of descent and distribution of the District of Columbia. It did not in any wise relieve the interest which beneficiaries received in the probate assets of a decedent or intestate from bearing its share of the federal estate tax.¹³

It is incontrovertible, as stated in *Herson, supra*, p. 715, that there is "no express provision * * * in any law of this jurisdiction [District of Columbia] * * * which apportions the federal estate tax among beneficiaries of a decedent's estate or exempts the widow's [surviving spouse's] share from liability" when she elects to take her share of a decedent's probate assets under the statutes of descent and distribution of the District of Columbia by renouncing the will of her deceased spouse. Moreover, this Court in *District of Columbia v. Payne, supra*, unequivocally stated that under the rule in *Riggs*, App. D.C., p. —, 374 F. 2d, p. 265, "If Congress had intended to allow apportionment, it could easily have done so". (Emphasis supplied). It is horn-book law that the Congress, which enacts the statutes of the District of Columbia, "has the power to enact an apportionment of federal estate tax statute providing for a different method of bearing the impact of federal estate taxes if it should determine the same desirable." *In re Uihlein's Will*, 264 Wis. 362, 376, 59 N.W. 2d 641, 648 (1963). It is clear from the foregoing that the Congress, in its role as the custodian of the public policy of the District of Columbia, has chosen *not* to enact any statute which would apportion the federal estate tax among the beneficiaries who share in the probate assets of a decedent either under the provisions of his will or by virtue of the statutes of descent or distribution.

¹³ See *District of Columbia v. Payne*, — App. D.C. —, —, 374 F. 2d 261, 265, fn. 4 (1966); *In re Tarver's Estate*, 255 F. 2d 913, 917 (C.A. 4th 1958); *Merchants National Bank & Trust Co. v. United States*, 246 F. 2d 410, 412-413 (C.A. 7th 1957); *Thompson v. Wiseman*, 233 F. 2d 734, 737 C.A. 10th 1956; *Hughes v. Sun Life Assur. Co. of Canada*, 159 F. 2d 110, 113-114 (C.A. 7th 1946); *Rogan v. Taylor*, 136 F. 2d 598, 599, 599-560 (C.A. 9th 1943); *Guaranty National Bank v. Mitchell*, 144 W. Va. 828, 832, 111 S. E. 2d 494, 496 (1959); *In re Rettenmeyer's Estate*, 345 P. 2d 872, 880 (Okla. 1959); *In re Uihlein's Will*, 264 Wisc. 362, 373, 59 N.W. 2d 641, 646-647 (1963);

2. *It is the province of the Congress, which enacts the statutes of the District of Columbia, to determine whether it should be the public policy of the District that a widow who renounces the will of her deceased husband and elects in lieu thereof to take her share of the husband's probate assets under the statutes of descent and distribution should receive her portion of these probate assets free from any impact of the federal estate tax*

It is the position of the Government that it is the province of the Congress, which enacts the statutes of the District of Columbia, to determine whether it should be the public policy of the District that a widow who renounces the will of her deceased husband and elects in lieu thereof to take her share of the husband's probate assets under the statutes of descent and distribution should receive her portion of these probate assets free from any impact of the federal estate tax.

In *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 148, 163 A. 2d 538, 544 (1960), the Supreme Court of Maine in referring to a legislative determination of public policy in a parallel situation said:

We think that whether or not a surviving spouse who elects to renounce a will should be wholly or partly relieved of the burden of federal estate tax is a matter of public policy which should be left to legislative determination. *Wachovia Bank & Trust Co. v. Green*, 1953, 236 N.C. 654, 73 S.E. 2d 879; *In re Uihlein's Will*, *supra*; *Weinberg v. Safe Deposit & Trust Co.*, *supra*.

Moreover, in *Weinberg v. Safe Deposit & Trust Co.*, 198 Md. 539, 549, 85 A. 2d 50, 54 (1951), which also involved the renunciation by a surviving wife of the will of the deceased husband, the court observed:

* * * we [courts] cannot substitute considerations of fairness and equity for definite legislative directions on matters entirely under legislative control. If the legislature finds that the present law produces general unfairness (about which we express no opinion) it can always change the statute, but unless and until it does, we can only interpret the law according to its plain intent and meaning.

The Court of Appeals for the Seventh Circuit adopted a similar approach in *Hughes v. Sun Life Assur Co. of Canada*, 159 F. 2d 110 (1946), stating (p. 114):

Illinois has no provision in its laws relating to the incidence of the burden of the federal tax * * *. In the absence of statutory enactment directing otherwise, the federal tax must be considered as a charge against the whole estate.

To the same effect see *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 513, 101 N.E. 2d 604, 607 (1951); *Thompson v. Wiseman*, 233 F. 2d 734, 739 (C.A. 10th 1956); *Knowles v. National Bank of Detroit*, 345 Mich. 671, 76 N.W. 2d 813 (1956). In *Knowles, supra*, the Supreme Court of Michigan, in applying these well established principles, stated (345 Mich., pp. 678-679, 76 N.W. 2d, p. 817):

In the absence of a proration statute in this State, and in the absence of a contrary intention expressed by the testatrix in paragraph 6 of her will, the burden of the Federal estate taxes must fall upon the residuary estate. As in the *Moorman* case [involving a surviving spouse's disavowal of a decedent's will], in the absence of statute, we decline to follow the equitable proration doctrine urged by the plaintiff-appellant in the instant case.

* * * whether this State shall adopt the so-called equitable doctrine of proration of federal estate taxes is a matter for the legislature, not for the court, to put into law. According to the record, some 23 states have passed proration laws. Michigan has not.¹⁴

Taxpayer concedes (Br. 22-23) that subsequent (1) to the decision by the Supreme Court in *Riggs* and (2) to the enactment by the Congress of the marital deduction provision in 1948, the principles set forth above have been followed and applied by five different states in cases on all fours with the instant case in which the surviving spouse had renounced the devises and bequests made to her under her husband's will and had elected to take in lieu thereof her legal share of the probate

¹⁴ As set forth in Appendix, *infra* pp. 76-78, at present, some twenty-nine states have now passed a variety of different and inconsistent apportionment statutes, but as noted above and, as stated by this Court in *Herson, supra*, p. 715, there is "no express provision * * * in any law of this jurisdiction [District of Columbia] * * * which apportions the federal estate tax among beneficiaries of a decedent's estate or exempts the widow's [surviving spouse's] share of liability."

assets, to wit: *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 163 A. 2d 538 (1960); *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E. 2d 695 (1954); *In re Uihlein's Will*, 264 Wisc. 362, 59 S.W. 2d 641 (1953); *Wachovia Bank and Trust Co. v. Green*, 235 N.C. 654, 73 S.E. 2d 879 (1953); *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 101 N.E. 2d (1951). However, *in addition to these five states*, there are cases in *four additional states* and two United States Courts of Appeals which have also refused by judicial fiat to create an apportionment rule which would exonerate the surviving spouse's share in the deceased spouse's distributable probate assets from any federal estate taxes after she had renounced the deceased spouse's will. These cases in the state courts are: *In re Glovers' Estate*, 45 Haw. 569, 371 P. 2d 361 (1962); *Guaranty National Bank v. Mitchell*, 144 W. Va. 845, 111 S.E. 2d 494 (1959); *Moorman v. Moorman*, 340 Mich. 636, 66 N.W. 2d 248 (1954); *Weinberg v. Safe Dep. & Trust Co.*, 198 Md. 539, 85 A. 2d 50 (1951). The two cases in the United States Courts of Appeals are *Merchants National Bank & Trust Co. v. United States*, 246 F. 2d 410 (C.A. 7th 1957); and *Thompson v. Wiseman*, 233 F. 2d 734 (C.A. 10th 1956). The decisions in the two latter cases were governed by the laws of Indiana and Oklahoma, respectively.

Taxpayer in effect further concedes (Br. 15) that this Court in *Hepburn*, *supra*, and the District Court for the District of Columbia in *Herson*, *supra*, and in the instant case, because of the absence of "any contrary direction in the will" and the absence of any apportionment statute "have adopted a rule *against* apportionment for the District of Columbia requiring * * * the payment of the full estate tax out of the residuary personal estate." (Emphasis supplied.) However, taxpayer contends that this Court should now reverse its decision in *Hepburn* and should reject the law as applied in *Herson* and in the instant case. It urges that this Court, notwithstanding the eleven cases cited in the previous paragraph, should by judicial fiat create and adopt an apportionment rule which will "permit [the] reaching of the result herein contended for" by taxpayer, including a reversal of the judgment of the court below. (Br. 7.)

One of the grounds urged by taxpayer in support of this contention, which we submit is totally devoid of any merit, is that the "adoption of such rule by this Court will further accomplish the desirable end of avoiding conflict in marital property

rights with the neighboring states of Virginia and Maryland." (Br. 6) in that "the law of Maryland (and Virginia) * * * provides for the full exoneration of property passing to a surviving spouse which qualifies for the marital deduction (Br. 33). The basic fallacy of this ground advanced by the taxpayer is readily apparent. Neither the courts of Maryland nor the courts of Virginia have by judicial fiat created and adopted a rule to apportion federal estate taxes. These are the indisputable facts: Maryland and Virginia have obtained an apportionment rule for federal estate taxes only after many tortuous sessions in successive legislatures covering a period of about twenty-eight years.¹⁵

As already pointed out, the Congress, notwithstanding the decision of the Supreme Court in *Riggs* in 1942 and the enactment by the Congress of the marital deduction in 1948, has steadfastly refused to adopt any statute for the District of Columbia which would apportion federal estate taxes in the same manner as have the Maryland and Virginia statutes.

Nor, we respectfully submit, does "the recommendation made in 1958 by the National Conference of Commissioners on Uniform State Laws that a Uniform Estate Tax Apportionment Act be adopted by all of the states" (Br. 22), warrant or authorize this Court, under our doctrine of separation of powers, by judicial fiat to create and adopt a rule of apportionment of federal estate taxes solely by reason of the failure of the Congress to so act or comply with this recommendation of the National Conference on Uniform Laws. Moreover, it appears that only one state, North Dakota, has up to 1967, adopted the Uniform Estate Tax Apportionment Act. (Appendix C to Taxpayer's Br., p. 25.)

Furthermore, while twenty-nine states have adopted apportionment statutes (Appendix C to Taxpayer's Br., pp. 17-30), it is incontrovertible that these apportionment statutes differ from each other in many material respects. Moreover, some of them expressly refused to enact a rule of apportionment which provides that "the surviving spouse, in the case of intestacy or election against the will of a testate decedent, should take his or her statutory share free of any estate tax," as tax-

¹⁵ See Appendix, *infra*, pp. 75-76.

payer urges this Court to adopt by judicial fiat (Br. 24). There are material differences and inconsistencies in these various statutes which had been adopted by these twenty-nine states.¹⁶

Therefore, in view of the absence of any statute or law in the District of Columbia (1) which apportions the decedent's federal estate tax among the beneficiaries of his estate or (2) which exonerates the share of his probate assets to which his surviving spouse is entitled under her election from any impact of the federal estate tax, it is respectfully submitted that it is obvious that the Congress in its role as the legislative body for the District intended that such tax is to be paid out of decedent's probate assets *before* any distribution of any portion thereof is made to his surviving spouse.

E. It is the intention of the Congress acting in its role as the legislative body for the District of Columbia, whenever a decedent domiciled in the District of Columbia is survived by a spouse and a child, and that spouse disavows his will and elects to take her legal share of his probate assets, then such surviving spouse is entitled to receive only one-third of the balance or surplus of these assets, remaining after the deduction therefrom of funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes

As we will develop below, it is also clear that the Congress in its role as the legislative body for the District intended that whenever a decedent domiciled in the District of Columbia is survived by a spouse and a child and his spouse disavows his will and elects to take her legal share of his probate assets, then such surviving spouse is entitled to receive only one-third of the *balance* or *surplus* of these assets, remaining after the deduction therefrom of funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes.

1. *The term "surplus" of an intestate's probate assets which is distributable under the descent and distribution statutes of the District of Columbia as amended on September 14, 1961, and as re-enacted on September 14, 1965, means the balance of the intestate's probate assets remaining after deducting therefrom the intestate's funeral expenses, debts, claims against him, and all expenses incurred in the administration of his estate, including federal and District of Columbia estate taxes*

As expressly set forth in the Report of the House of Representatives which accompanied the bill which on August 31,

¹⁶ See Appendix, *infra*, pp. 76-78.

1957, amended Section 18-101 of the District of Columbia Code (1951 ed.), it was the intent of the Congress to "abolish all present distinctions as between the order of succession in the descent of real property and the distribution of personal property of an intestate" and to provide "that real property shall descend in the same order as personal property, under present law, is distributed * * * [and thus] provide for uniformity in succession of real and personal property" which "Makes realty descend exactly as personalty now does, including the share to spouse." H. Rep. No. 304, 85th Cong., 1st Sess., p. 2 (Appendix, *infra*).

As further disclosed in H. Rep. No. 304, 85th Cong., 1st Sess., p. 4, it was also the intent of the Congress in the same bill to amend Sections 18-210 and 18-211 of the District of Columbia Code (1951) to empower "every surviving spouse (widow or widower), who is given anything under the will of the deceased spouse, [to] renounce if he or she prefers to take her or his intestate share" thereby to vest in "either spouse statutory rights in real and personal property by renunciation" and accordingly "by renouncing [the will] either spouse surviving (widow or widower) can take her or his full statutory share of the real or personal property of the deceased spouse" as provided in Sections 18-701, 18-702, 18-703, and 18-704 of the District of Columbia Code (1951 ed.).

It is incontrovertible, therefore, that, as a result of this 1957 amendment, the term "surplus" in Sections 18-701, 18-702, 18-703, and 18-704 of the District of Columbia Code (1951 ed.) now applied not only to the "surplus" personal estate of the decedent but also to his "surplus" probate estate, which included his personal *and* his real property.¹⁷ These provisions were codified in the District of Columbia Code (1961 ed.).

¹⁷ Nevertheless, as we have shown in Subdivision D(1) of our brief, *supra*, it is still the law of the District of Columbia, as it is plainly set forth in Sections 18-101 and 18-211 of the 1961 Code as amended on September 14, 1961, Appendix, *infra*, read *in pari materia*, that, upon renunciation of the will by the surviving spouse, the personal estate of the decedent is nonetheless first called upon "for payment of the intestate's [decedent's] funeral expenses, debts, costs of administration, and estate, inheritance and succession taxes." This, too, is plain. It is only "in the event of insufficiency of the personal estate" for such payments, that the real property of the decedent is called upon for such payments "in the same manner and to the same extent

The ancestral statute of the descent and distribution statutes of the District of Columbia is found in the Maryland Act of 1789, c. 101, subc. XI.¹⁸ Therein we first find the term "surplus", written into the statute. These provisions of the Maryland Act were in effect followed in the District of Columbia prior to and subsequent to the enactment of the 1901 Code of laws of the District of Columbia,¹⁹ except that in 1957, the "surplus" embodied both the personal and real property of the intestate. Consequently, the court below correctly observed that "This phraseology about *surplus* has been in there for some time and laws have been passed since then." (Emphasis supplied.) (JA 49.) As we have shown above, the term "surplus" in the District of Columbia applied to the personal estate of the intestate until 1957. Thereafter it also applied to his real property.

Furthermore, the Congress on September 14, 1965, in enacting the Act of September 14, 1965, P.L. 89-183, 79 Stat. 685, Sec. 1 which codified "the general and permanent laws relating to decedents' estates and fiduciary relations in the District of Columbia", re-enacted Section 18-101 as Section 19-301, Sections 18-702, 18-703, and 18-704 as Sections 19-302, 19-303, and 19-304, and Section 18-701 as Section 20-1901. The term "surplus" was again written into each of these sections, indisputably without any attempt in anywise to change the meaning of that term, even though it then applied to both real and personal probate assets of the intestate. That such was the intent of the Congress readily appears in S. Rep. No. 612, 89th Cong., 1st Sess. (Appendix, *infra*), which accompanied the bill enacted as the Act of September 14, 1965, *supra*, and which

as the personal estate of the intestate." This Court has, of course, so held in *Hepburn v. Winthrop*, *supra*, pp. 316, 316, 83 F. 2d, pp. 572, 573, and in *Vogel v. Saunders*, 63 App. D.C. 31, 34-35, 92 F. 2d 984, 987-988 (1937).

¹⁸ Maryland Act of 1789, c. 101, subc. XI, as herein pertinent, provides:

"Where all the debts of an intestate, exhibited and proved, or notified and not barred, shall have been discharged, or settled and allowed to be retained, as herein directed, the administrator shall proceed to make distribution of the *surplus* as follows:

* * * *

"Sec. 2. If there be a widow, and a child or children, or a descendant or descendants from a child, the widow shall have one-third only." (Emphasis supplied.)

¹⁹ 10 District of Columbia Code Encyclopedia Annotated, p. 151.

codified "the general and permanent laws relating to decedents' estates." Therein the intent of the Congress is expressed as follows (p. 3):

The primary purpose of this revision is to substitute plain language for awkward terms, reconciliation of conflicting law, omission of obsolete, superseded, or repealed sections, consolidation of similar provisions, and improvement in the style and arrangement of the material.

It is not the purpose to make substantive changes in the law. While, in a few sections, changes have been made which might at first comparison be considered "substantive," actually it is intended to reflect in those changes only what apparently was the legislative intent, or is implied in the provisions themselves, or *has been stated by the courts in construing the sections.* (Emphasis supplied.)

As we have indicated above, Sections 19-301 and 19-303 of the District of Columbia Code (1961 ed., Supp. V) as enacted on September 14, 1965, are substantially the same as Sections 18-101 and 18-703 of District of Columbia Code (1961 ed., Supp. IV). Section 19-301 as pertinent, provides:

(a) The real estate * * * and the surplus of the [his] personal estate * * * shall be distributed, to the surviving spouse, children, and other persons in the manner provided by this chapter. The heirs specified by this subsection take the real estate as tenants in common in the same proportions as they take the surplus personal estate as provided by this chapter.

(b) * * * the real estate specified by subsection (a) of this section is *liable*, where the personal estate is insufficient, *for the payment of the* intestate's funeral expenses, debts, costs of administration, and *estate* * * * taxes in the same manner and to the same extent as the personal estate of the intestate * * *. (Emphasis supplied.)

Section 19-303, as herein pertinent, also provides:

When the intestate leaves a surviving spouse and child * * * the surviving spouse is entitled to one-third.

It is the position of the Government, adopting the language of S. Rep. No. 612, 89th Cong., 1st Sess., p. 3, that (1) "[it] was the legislative intent," (2) "[it] is implied in the provisions themselves," and (3) "[it] has been stated by the courts in construing the sections" that one-third of the "surplus" to which decedent's surviving spouse was entitled under Section 18-703 of the 1961 District of Columbia Code prior to the 1965 amendment thereto (which is identical with Section 19-303 of the 1961 Code subsequent to the 1965 amendment) is one-third of the *balance* of decedent's probate estate remaining after deducting therefrom the "funeral expenses, debts, costs of administration and estate * * * taxes." That such "was the legislative intent" and was "implied in the provisions [statutes] themselves" we will demonstrate in Subsection E(1) (a) and (b) of our brief, *infra*.

(a) *The Congress in amending Section 18-211 of the District of Columbia Code (1961 ed.) on September 14, 1961, manifested its intention that the meaning of surplus probate assets which has always appeared in the District of Columbia Code is identical with the meaning of net probate assets of a decedent or intestate*

The decedent died on August 17, 1963. (JA 14.) Consequently, Section 18-211 of the District of Columbia Code (1961 ed., Supp. IV), as amended by Sec. 4, Marital Property Rights Amendment of 1961, P.L. 87-246, 75 Stat. 515, Appendix, *infra*, on September 14, 1961, are herein applicable.

As thus amended, Section 18-211 provides in paragraph (a) thereof that a surviving spouse of a decedent may, "within six months after the will of the deceased spouse is admitted to probate * * * file in the probate court a written renunciation", and may "renounce and quit all claim to any devise or bequest made to me [her] by the last will of my [her] husband * * * exhibited and proved according to law; and * * * elect to take in lieu thereof my [her] legal share of the real and personal property of my [her] said spouse." In the instant case the surviving spouse in accordance with this provision timely filed on November 1, 1963, such renunciation and election. (JA 46.)

Section 18-211, as thus amended, further provides in paragraph (e) thereof, as herein pertinent—

By renouncing all claim to any and all devises and bequests made to her * * * by the will of the husband * * * the surviving spouse shall be entitled to such share or interest in the real and personal estate of the deceased spouse * * * which she * * * would have taken had the deceased spouse died intestate, except that in * * * [no] event shall the surviving spouse be entitled to more than one-half of the *net* estate bequeathed and devised by said will * * *. (Emphasis supplied.)

H. Rep. No. 679, 87th Cong., 1st Sess., Appendix, *infra*, which accompanied the bill which was enacted as the "Marital Property Rights Amendments of 1961", states (pp. 1-2):

The 1957 act [including Section 18-211 thereof, which was amended in 1961] established a uniform succession to real and personal property by providing that real estate should descend to the decedent's spouse and kindred in the same manner as the personal estate, i.e., that on intestacy the same persons take the real estate, and in the same shares, as they are entitled to the *surplus personal property* according to the statutes of distribution now or hereafter controlling. (Emphasis supplied.)

The 1961 amendment quoted in the penultimate paragraph expressly limited and restricted the surviving spouse's share of decedent's probate assets (real and personal) to one-half of the surplus of decedent's probate assets and it characterized such "surplus" as "one-half of the *net* estate bequeathed and devised by said [decedent's] will." (Emphasis supplied.)

The Congress in thus limiting and restricting the widow's share in the *surplus* or *net* probate assets of the decedent, whenever she disavows the decedent's will and elects to take in lieu thereof her legal share of his probate assets, in H. Rep. No. 679, 87th Cong., 1st Sess., stated its reason therefor, as follows (p. 2):

Under the law as it now stands, a wife owning substantial real property of her own, and having no relatives closer than nephews and nieces, cannot make a will which will be effective and certain to dispose of

any part of her estate other than to her husband *because if he survives her he can renounce the will and take her entire estate.* (Emphasis supplied.)

It further elaborated upon its reason as follows (p. 4):

* * * [the amendment] provides a limitation on the share the surviving spouse filing a renunciation can receive in derogation of the will. There has been substantial criticism of the present law in that, on renunciation, the surviving spouse can in the circumstances of no relatives closer than nephews and nieces take the entire estate of the deceased spouse and wholly defeat the testator's intentions. The bill limits the renouncing spouse to one-half of the *net* estate * * *. (Emphasis supplied.)

To understand more fully the reasons of the Congress as thus incorporated in the above quotations from H. Rep. No. 679, *supra*, we shall set forth Sections 18-701 and 18-702, District of Columbia Code (1961 ed.), Appendix, *infra*, which were last amended on April 19, 1920, and which were effective as of the date of decedent's death.

Section 18-701 of the District of Columbia Code (1961 ed.) provides:

Distribution—When to be made.

When the debts of an intestate, exhibited and proved or notified and not barred, shall have been discharged or settled, or allowed to be retained as herein directed, the administrator shall proceed to make distribution of the surplus as provided in this chapter.

Section 18-702 of the 1961 District of Columbia Code (1961 ed.), further provides:

When surviving spouse entitled to whole.

If the intestate leave a widow or surviving husband and no child, parent, grandchild, brother, or sister, or the child of a brother or sister of the said intestate, the said widow or surviving husband shall be entitled to the whole [of the surplus personal property].

It is plain that, without such limitation written into the 1961 amendment to Section 18-211, a widow by disavowing the decedent's will, in the event the decedent had no relatives closer than nephews and nieces surviving him, would pursuant to

Section 18-702 of the 1961 Code "be entitled to the whole" *surplus* or *net* probate assets of the decedent.

An examination of H. Rep. No. 679, 87th Cong., 1st Sess., *supra*, further discloses that the Congress in this 1961 amendment did not in any wise attempt to limit or restrict the share of the *surplus* probate assets of a decedent which is distributable to a widow who had disavowed his will and which she would be entitled to receive under the circumstances outlined in Section 18-704 of the 1961 District of Columbia Code (set forth below) which had been last amended on April 19, 1920. Under this section, if the decedent is also survived by other specified heirs and relatives, his widow who had renounced his will would incontrovertibly be entitled to one-half of the surplus probate assets of the decedent. Section 18-704 Appendix, *infra*, provides:

When surviving spouse entitled to one-half.

If there be a widow or surviving husband and no child or descendants of the intestate, but the said intestate shall leave a father or mother, a brother or sister, or child of a brother or sister, the widow or surviving husband shall take one-half [of the surplus personal property].

It is, however, no inadvertence or accident that no reference is made in H. Rep. No. 679, 87th Cong., 1st Sess., *supra*, to the provisions of Section 18-704 of the District of Columbia Code (1961 ed.). The reason therefor is clear. Under Section 18-704 and the facts therein delineated, it is indisputable that the widow who had renounced her husband's will would be entitled to one-half of the *surplus* probate assets of her husband. And, as we have already shown, the Congress, by its characterization in its 1961 amendment of Section 18-211 of *surplus* probate assets as *net* probate assets, plainly intended that the term "surplus" as used in chapter 7, entitled "Distribution of Surplus," which include Sections 18-701, 18-702, 18-703 and 18-704 as applied to probate assets is identical with the term "net" as therein applied to probate assets.

In harmony with such intention of the Congress, under the facts in the case at bar, namely, that the decedent was survived by his wife and a son, it is indisputable that the distributable share of a widow who had disavowed her husband's will is, under Section 18-703 of the District of Columbia Code (1961 ed.), restricted only to one-third of the surplus of decedent's surplus probate assets. Section 18-703 provides:

When surviving spouse entitled to one-third.

If there be a widow * * * and a child or children, or a descendant or descendants from a child, the widow * * * shall have one-third only [of the surplus probate assets of decedent].

And the one-third of the *surplus* probate assets, for the reasons hereinabove set forth, we respectfully submit, is identical with one third of the *net* probate assets of decedent.

(b) *The Congress in amending Section 18-101 of the District of Columbia Code (1961 ed.) on September 14, 1961, manifested its intention that surplus probate assets or net probate assets, which are indistinguishable under the descent and distribution statutes, are only the probate assets of the intestate remaining after deducting therefrom funeral expenses, debts, claims and all expenses of administration, including federal and District of Columbia estate taxes*

As amended on September 14, 1961, Section 18-101 of the District of Columbia Code (1961 ed.) provides:

Course of descents generally.

On the death of any person seized of or entitled to an interest in an estate in lands * * * in the District of Columbia, and intestate thereof, the same shall descend in fee simple to such person's surviving spouse, if any, and kindred, who according to the laws of the District of Columbia now or hereafter in force relating to the distribution of the personal property of intestates, would be entitled to the *surplus personal property* of such intestate, if he * * * had died a resident of the District of Columbia and possessed of such *surplus personalty*; and such surviving spouse and kindred shall take as tenants in common in the *same proportions* as are or shall be fixed by such laws relating to personal property * * *. * * * [Furthermore] such real property shall be liable, in the event of insufficiency of personal property, for the payment of the intestate's *funeral expenses, debts, costs of administration, and estate, inheritance, and succession taxes in the same manner and to the same extent as the personal property of such intestate.* (Emphasis supplied.)

H. Rep. No. 679, 87th Cong., 1st Sess., *supra*, p. 3, in commenting on Section 18-101 as amended in 1961, states that it—

is substantially the same as in the 1957 law. It establishes a uniform succession of both real and personal property, *but expressly provides for the payment of debts, administration expenses and taxes out of the decedent's real property if there is a deficiency of personal property.* (Emphasis supplied.)

It is apparent that this 1961 amendment to Section 18-101 of the District of Columbia Code (1961 ed.) is in effect a Congressional statutory enactment which approves the rule in *Hepburn*, *supra*, as declared by this Court, to the effect that federal estate taxes must be paid out of the personal property of the decedent, and if the personal property is insufficient to pay the federal estate taxes, then and only then would the real property of the decedent be called upon to pay the federal estate tax.²⁰

Therefore, it is respectfully submitted that the Congress in amending Section 18-101 of the District of Columbia Code (1961 ed.) on September 14, 1961, manifested its intention that *surplus* probate assets or *net* probate assets, which are indistinguishable under the descent and distribution statutes, are only the probate assets of the intestate remaining after deducting therefrom funeral expenses, debts, claims and all expenses of administration, including federal and District of Columbia estate taxes.

(c) *The courts which have had the occasion to construe the term "surplus" as it is incorporated in the statutes of descent and distribution have consistently held, in accord with the intent of the Congress, that surplus probate assets of an intestate which are distributable under those statutes means*

²⁰ This Court in *Hepburn*, in affirming the lower court on this issue, expressly rejected the contention of the taxpayer in that case to the effect that the federal estate taxes should be apportioned between the personal and real property, stating (63 U.S. App. D.C., p. 316, 83 F. 2d, p. 573):

"* * * in the absence of any provision in the will directing a contribution from the real estate and in the absence of a local statute on the subject, it is clear that the payment of the [federal estate] tax out of the personal residuary estate was, like the payment of debts, an expense of administration; and, as to it, the decision of the lower court should be approved." (Emphasis supplied.)

only the probate assets of the decedent remaining after deducting therefrom funeral expenses, debts, claims and all expenses of administration, including federal estate taxes

Herson v. Mills, 221 F. Supp. 714 (D.C.D.C. 1963), as already pointed out, is on all fours with the case at bar. In sustaining the contention of the defendant in that case, to wit, "that the amount of the widow's statutory one-third share is to be computed *after* deducting from the decedent's estate the whole of the federal estate tax" (p. 715) (emphasis supplied), that court held (p. 716):

The federal estate tax being in the nature of an administration expense is taken from the estate *before* the property is set off to the beneficiaries. The tax is not a payment as to which the beneficiaries have any concern as it is a charge against the estate and not the legatees or distributees. *Hepburn v. Winthrop*, 65 App. D.C. 309, 83 F. 2d 566. (Emphasis supplied.)

This Court in *Hepburn*, *supra*, held (65 U.S. App. D.C., p. 315, 83 F. 2d, p. 572):

Section 407 of the act [Revenue Act of 1918] declares that the [federal estate] tax is to be paid by the executor *before* distribution. This implies that the tax is of the nature of an administration expense. It is to be paid in money out of any available funds, or, if there be none, by converting property into money for the purpose. * * * It is taken from the estate *before* the property is set off to the beneficiaries. It is therefore not a payment as to which the beneficiaries have any concern. It is not a charge against either legatees or distributees.

The identical issue herein presented to this Court for decision has, in effect, been decided in harmony with the holding in *Herson* and *Hepburn* by the Court of Appeals of Maryland in *Weinberg v. Safe Dep. & Trust Co.*, 198 Md. 539, 85 A. 2d 50 (1951). In *Weinberg*, *supra*, that court construed the term "surplus", which, as set forth in footnote 18, *supra*, appears in the Maryland Act of 1798, c. 101, subc. XI, and which was reenacted in the provisions of the Code of Maryland construed in *Weinberg*, as well as in the current 1957 Code of Maryland. In *Weinberg* the Court of Appeals of Maryland held (198 Md., p. 546, 85 A. 2d, p. 52):

Where a spouse renounces * * * [the] bequests given [to her] under such will * * * [she] cannot become entitled to more than \$2,000.00 and one-half of the surplus personal estate remaining. The term "surplus personal estate" has been defined as meaning the entire balance, principal and income at the time of distribution, *Gardner v. Mercantile Trust Co.*, 164 Md. 280, 283, 164 A. 663, which necessarily is the balance after all expenses of administration and debts, including taxes, have been paid. Article 93, Secs. 5, 123 and 127. *Mercantile Trust Co. v. Schloss*, 165 Md. 18, 31, 166 A. 599. *Marriott v. Marriott*, 175 Md. 567, 571, 3 A. 2d 493.

Under the law of Maryland (*Clarke v. Welden*, 204 Md. 26, 29, 102 A. 2d 560, 561 (1954)), as under the law of the District of Columbia, the federal estate "tax is payable * * * as a debt of the estate or an expense of administration. *Y.M.C.A. v. Davis*, 264 U.S. 47; *Hepburn v. Winthrop* [65 App. D.C. 309], 83 F. 2d 566."

In 1902 the Court of Appeals of Maryland decided *Hunter v. Hersperger*, 96 Md. 292, 54 A. 65, which involved the quantum of the distributable share of the personal assets of the intestate labelled as "surplus". In its ruling in that case, which was handed down nearly fifty years prior to its decision in *Weinberg*, and manifestly prior to the enactment of the Federal Estate Tax Act in 1916, the court defined "surplus" as follows (96 Md., pp. 295-296, 54 A., p. 67):

* * * surplus * * * means that part of the estate [of the intestate] * * * [a]fter the debts and expenses connected with the administration are ascertained [and thereafter], the surplus should be distributed.

Hence, if there had been a federal estate tax in 1902 which provided that a lien for federal estate taxes is impressed upon the intestate's gross estate at his death, *Hunter v. Hersperger*, *supra*, under the teaching of *Clarke v. Welden*, *supra*, and *Weinberg*, *supra*, would have treated the federal estate tax "as a debt of the estate or an expense of administration," and it appears plain, that such federal estate taxes would also have been deducted from the probate assets of the intestate before determining the distributable surplus under the descent and distribution statutes. In view of the virtual identity since 1789 of the herein applicable provisions of the laws of Maryland and

the District of Columbia involving the use of the term "surplus," these decisions of Maryland, while not binding on this Court, should, we respectfully submit, be persuasive in the case at bar under the teaching of this Court in *Watkins v. Rives*, 75 U.S. App. D.C. 109, 111, 125 F. 2d 33, 35 (1941).²¹

We will presently show that this Court has also consistently so construed the term "surplus" as did the Court of Appeals of Maryland both prior to and subsequent to the enactment of the District of Columbia Code of 1901.

Keeping in mind that it is the settled law as declared by this Court that the federal estate tax "is of the nature of an administration expense" and that "It is taken from the estate before the property is set off to the beneficiaries" (*Hepburn v. Winthrop*, *supra*, 65 U.S. App. D.C., p. 315, 83 F. 2d, p. 572), it should be pointed out that this Court, even prior to the enactment of the District of Columbia Code of 1901, in *Glenn v. Sothoron*, 4 App. D.C. 125 (1894), stated (p. 135): "Legatees and distributees * * * are not entitled to anything except the surplus of the assets after all debts are paid." Furthermore, this Court in *Wiggins v. Mayer*, 57 App. D.C. 293, 22 F. 2d 869 (1927), which involved the distribution of the "surplus" under the descent and distribution statutes, held (57 App. D.C., p. 294, 22 F. 2d, p. 870):

There can be no true "surplus" for distribution among beneficiaries until after the satisfaction of all lawful debts of the estate.

A lawful administration of the estate requires that the assets shall be applied to the payment of all decedent's lawful debts, before any part thereof shall go to anyone by inheritance.

In *Condon v. Mallan*, 58 App. D.C. 371, 30 F. 2d 995 (1929), this Court, in construing a precursor of Section 18-704 of the District of Columbia Code (1961 ed.), equated "surplus" with "balance," stating (58 App. D.C., p. 372, 30 F. 2d 995, 996):

²¹ In *Watkins*, *supra*, this Court stated (75 U.S. App. D.C., p. 111, 125 F. 2d, p. 35):

"Although Maryland statutes and Maryland decisions of later date than 1801 do not constitute the law of the District of Columbia, nevertheless, this court has, customarily, looked to later decisions of the Court of Appeals of Maryland for assistance, not merely in interpreting the law which was inherited from that State, but also in interpreting later statutes of the District which are the same or closely similar to those of Maryland."

After payment of the expenses of *administering* the estate, one half of the *balance* of the fund should be distributed to the daughter of the deceased widow.

See also *Randall v. Bockhorst*, 98 U.S. App. D.C. 77, 232 F. 2d 334 (1956), in which this Court held (98 U.S. App. D.C., p. 80, fn. 5, 232 F. 2d, p. 337, fn. 5): "Under the Code provisions governing descent and distribution the widow takes one-half of the *surplus remaining after payment of debts* * * *." (Emphasis supplied.) In *Joyce v. Scott*, 105 U.S. App. D.C. 177, 179 265 F. 2d 368, 371 (1959), this Court also held that the intestate's "assets must first respond to the claims of creditors" and that "under the District of Columbia Code [Section 18-703 (1951 ed.)], the widow will receive *only* one-third of any *balance* [of the intestate's assets] *remaining*." (Emphasis supplied.) Such settled law, as herein pertinent, variously declared by this Court, was summarized in 10 District of Columbia Code Encyclopedia Annotated (1967) as follows (p. 259): "there can be no true 'surplus' for distribution among beneficiaries until after the satisfaction of all lawful debts of the decedent". See also the summarization in 1 Mersch, Probate Court Practice in the District of Columbia (2d ed.), which is as follows (p. 131):

The surplus, after satisfaction of administration expenses, the decedent's debts, and just claims against the personal representative, including funeral expenses allowed by the court, goes to the spouse and other distributees * * *.

Furthermore, the interpretation of the term "surplus" in descent and distribution statutes by the courts of the District of Columbia and Maryland is in harmony with the construction of such term by other courts which have had the occasion to construe it in the descent and distribution statutes of their respective states.

In *Kennedy v. Kennedy*, 97 W. Va. 491, 125 S.E. 337 (1924), the Supreme Court of Appeals of West Virginia, which had the occasion to construe the term "surplus" in its statutes of descent and distribution, which, as herein pertinent, are similar to those in the District of Columbia, held (97 W.Va., p. 493, 125 S.E., p. 340):

The word "surplus" means what remains of the estate after payment of funeral expenses, charges of adminis-

tration and debts. This statute gives to the widow one-third of the *surplus* as her distributive share.

And in a later case the same court in *Guaranty National Bank v. Mitchell*, 144 W.Va. 828, 111 S.E. 2d 494 (1959), held again that under the descent and distribution statutes of West Virginia federal estate taxes must be deducted from the decedent's probate assets before arriving at the *surplus* which is distributable pursuant to the provisions of those statutes.

In *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E. 2d 879 (1953), the Supreme Court of North Carolina also had the occasion to construe the term "surplus" in its statutes of descent and distribution, which, as herein pertinent, are also similar to the descent and distribution statutes of the District of Columbia. Therein the highest court of North Carolina held (236 N.C., p. 659, 73 S.E. 2d, p. 883):

The word *surplus* means the personal property left after payment of the debts of the deceased and the costs of administration. Douglas Administration of Estate, Sec. 222. It means the balance for distribution after all expenses of administration and debts including [federal estate] taxes have been paid. *Weinberg v. Safe Deposit & Trust Co.*, Md., 85 A. 2d 50, *Hunter v. Husted*, 45 N.C. 97. (Emphasis supplied.)

Taxpayer in its brief does not cite *any* decisions of this Court or *any* other court which has had the occasion to construe the term "surplus" in the context of statutes of descent and distribution of the respective states. Nonetheless, taxpayer, by employing conjectures and speculations, urges this Court to impute strained, illogical variations of meaning to the term "surplus" during the periods (1) from 1789 until 1916—the date of the enactment of the modern Federal Estate Tax Act; (2) from 1916 until 1948—the date of the enactment of the marital deduction provisions and (3) from 1948 to the present date; (Br. 25–32.) It is plain, in the light of the legislative history and the consistent holdings of various courts hereinabove set forth, taxpayer ingeniously contends, unmeritoriously, based upon its tenuous reasoning, that the Congress in all events intended that the term "surplus" should have the chronological "elasticity" which it has formulated. (Br. 31.) Taxpayer, we respectfully submit, in its desire to have this Court reverse the judgment of the court below, has plainly ignored the teaching of the Su-

preme Court in *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1924), to the effect that "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

Therefore, it is respectfully submitted that the "surplus" of an intestate's probate assets which is distributable under the descent and distribution statutes of the District of Columbia as amended on September 14, 1961, and re-enacted on September 14, 1965, means the balance of the intestate's probate assets remaining *after* deducting therefrom the intestate's funeral expenses, debts, claims against him, and all expenses incurred in the administration of his estate, *including* federal and District of Columbia estate taxes.

2. Congress, in its characterization in Section 18-211(e), District of Columbia Code (1961 ed.), as amended September 14, 1961, of the distributable portion of an intestate's probate estate as his "net estate," intended that such distributable portion includes only the balance or surplus of the intestate's probate estate remaining after deducting therefrom funeral expenses, debts, claims, and all expenses of administration, including federal and District of Columbia estate taxes

We have shown in Subdivision E(1) of our brief, *supra*, that the term "surplus" probate assets and the term "net" probate assets, as written into the descent and distribution statutes of the District of Columbia herein involved, have the identical meaning. In *Kilcoyne v. Reilly*, 101 U.S. App. D.C. 380, 249 F. 2d 472 (1957), the decedent's estate consisted solely of personal property. In that case a surviving spouse had "renounced the provisions of the will and elected to take under the statute [Section 18-704 of the 1961 District of Columbia Code]." Under Section 18-704 she was entitled to receive one-half of the "surplus" of the estate. In the opinion in *Kilcoyne*, *supra*, the surviving spouse's interest in decedent's probate assets was unequivocally and unambiguously characterized as "one-half of the *net* assets of the estate" (101 U.S. App. D.C., p. 382, 249 F. 2d, p. 474) (emphasis supplied) and as "the *net* distributable assets of a decedent" (p. 383, 294 F. 2d, p. 475). (Emphasis supplied).

In *Campbell v. Lloyd*, 162 Ohio St. 203, 125 N.E. 2d 695 (1945), certiorari denied, 349 U.S. 911, rehearing denied, 349 U.S. 948, *supra*, the widow, as in the case at bar, renounced her

husband's will and elected to take her share under the descent and distribution statutes of Ohio. Such statute, to wit, Section 10504-55 of the General Code of Ohio, quoted in *Campbell, supra*, provided that the widow's share "shall * * * not * * * exceed one-half of the *net* estate." (Emphasis supplied.) In *Campbell, supra*, as in effect in the case at bar, the question presented to the court for decision was whether the meaning of "the words 'net estate' is what remains of the estate after all debts and obligations of decedent and of the estate, including the federal estate tax, have been paid." (162 Ohio St., p. 205, 125 N.E. 2d, p. 697.) The Supreme Court of Ohio held that in determining the amount of the "net estate" it was mandatory that "the federal estate tax should first be deducted, like other debts and expenses of administration." (162 Ohio St., p. 208, 125 N.E. 2d, p. 698.)

In *In re Uihlein's Will*, 264 Wisc. 362, 59 N.W. 2d 641 (1953), the widow, as also in the case at bar, renounced her husband's will and elected to take her share under the descent and distribution statute of Wisconsin. Such statute, to wit, Section 233.14, 27 West's Wisconsin Statutes, Annotated, pertinently quoted in *In re Uihlein's Will, supra*, provided that the widow's share "shall not exceed the one-third part of his *net* personal estate." (Emphasis supplied.) In *Uihlein's Will, supra*, as in the case at bar, the question presented to that court for decision was (264 Wisc., p. 368, 59 N.W. 2d, p. 644): "Is the widow who has elected to take one-third share of the estate, pursuant to Sec. 233.14, Stats., entitled to such share without deduction therefrom of any portion of the federal estate tax?" The Supreme Court of Wisconsin therein held (p. 376, p. 658):

It seems to us that the words "*net estate*" of our statute are clear and unambiguous and are subject to no other interpretation than that they mean that part of the estate which remains after payment of all charges against the entire estate. Federal estate taxes stand in no different category than do debts or administrative expenses. We deem that it would be unwarranted judicial legislation for this court to attempt to apportion the impact of the federal estate tax * * *.

This holding and declaration of law in *Uihlein* was approvingly cited in *In re Glovers' Estate*, 45 Haw. 569, 580, 371 P. 2d 361, 367 (1962); *Old Colony Trust Co. v. McGowan*, 156 Me. 138,

145, 163 A. 2d 538, 542 (1960); *Moorman v. Moorman*, 340 Mich. 636, 643, 66 N.W. 2d 248, 251 (1954).

Hence it is respectfully submitted that the Congress, in its characterization in Section 18-211(e) of the District of Columbia Code (1961 ed.) as amended September 14, 1961, of the distributable portion of an intestate's probate estate as his "net estate", intended that such distributable portion includes only the balance or surplus of the intestate's estate remaining after deducting therefrom funeral expenses, debts, claims, and all expenses of administration, including federal and District of Columbia estate taxes.

In view of the foregoing, it is respectfully submitted that it is the intention of the Congress acting in its role as the legislative body for the District of Columbia, that, whenever a decedent domiciled in the District of Columbia is survived by a spouse and a child, his surviving spouse who disavows his will and elects to take her legal share of his probate assets is entitled to only one-third of the balance or surplus of the decedent's probate assets remaining after the deduction therefrom of funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes.

F. There is no merit to taxpayer's contention that the Congress, in enacting the marital deduction provisions in 1948 "implicitly expected" (Br. 30) that this Court, by judicial fiat, "must adopt a [so-called] rule of equitable apportionment of the [federal estate] tax" (Br. 5) in order to free from any impact of the federal estate tax the share of the distributable surplus of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703 of the District of Columbia Code (1961 ed.)

1. *Taxpayer's contention that it was the intention of the Congress that the settled application of the statutes of descent and distribution should by judicial fiat be modified by this Court as a result of the enactment of the marital deduction provisions, to the end that a surviving spouse's share of the probate assets of her deceased husband to which she is entitled under Section 18-703 of the District of Columbia Code (1961 ed.) should be free from any impact of federal estate taxes (and thereby increasing the amount of the allowable marital deduction) in order that "the purpose of the Congress [in enacting such deduction] will [not] be thwarted" (Br. 34), is devoid of any merit*

At the outset it should be pointed out that taxpayer in its brief does not refer to any specific provision of Section 2056 of the Internal Revenue Code (which provides for the marital deduction) to support its contention that it was the intention of the Congress by that enactment that this Court or any court should in anywise modify the application of the descent and

distribution statutes of a state in order that "the purpose of the Congress will [not] be thwarted." (Br. 34.) The reason for the absence of any such reference is clear. There is no such provision in Section 2056 of the Internal Revenue Code of 1954.

As disclosed in S. Rep. No. 1013 Part 2, 80th Cong., 2d Sess., p. 5 (1948-1 Cum. Bull. 331, 333), which accompanied the bill which enacted the marital deduction, it is the intent of the Congress (contrary to the contention of taxpayer) that the state statutes of descent and distribution should in nowise be modified by the marital deduction enactment, stating as follows (p. 5 (1948-1 Cum. Bull. p. 334)):

* * * if the surviving spouse elects to take her share of the decedent's estate under the local law instead of taking an interest under the will, *the interest she takes under the local law is by the definition in section 812(e) (3) [of the 1939 Code, now Section 2056(e) of the 1954 Code] considered as passing from the decedent to the surviving spouse [which qualifies for the marital deduction].* (Emphasis supplied.)

That the Congress in enacting the marital deduction did *not* in anywise intend state courts to modify the application of descent and distribution statutes of their respective states because of such enactment and the reasons therefor are succinctly summarized (1) by the Supreme Court of North Carolina in *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 695, 73 S.E. 2d 877, 883 (1953), as follows—

The federal tax statute as amended which makes provision for marital deduction does not have the effect of controlling the state statutes as to the administration of decedent's estate. Power in this respect has not been granted to the Federal Government, and the right of state control is reserved (10th Amendment). The Supreme Court of the United States has repeatedly declared the Federal Government is concerned only with the collection of the tax, leaving it to the states to determine how the burden shall be distributed and upon whom the impact shall fall. *Y.M.C.A. v. Davis*, 264 U.S. 47, 44 S. Ct. 291, 68 L. Ed. 558; *Riggs v. Del Drago*, 317 U.S. 95, 63 S. Ct. 109, 87 L. Ed. 106; *Fernandez v. Wiener*, 326 U.S. 340, 66 S. Ct. 178, 181, 90 L. Ed. 116. "Although the share of the surviving spouse is subject

to the lien and the tax must be paid out of the estate as a whole, the federal statute leaves it to the states to determine how the tax burden shall be distributed among those who share in the taxed estate." *Fernandez v. Wiener, supra*.

—and (2) by the Supreme Court of Wisconsin in *In re Uihlein's Will*, 264 Wisc. 362, 373, 59 N.W. 2d 641, 646-647 (1953), as follows:

While the marital deduction provisions of the federal estate tax law did not come into being until 1948, there is nothing contained in the 1948 amendments to the federal estate tax law which would render inapplicable the rule laid down in *Riggs v. Del Drago, supra*. Furthermore, U. S. Treasury Regulations 105, sec. 81.47(c) clearly recognize that local state law is determinative of the question of whether the widow's one-third share of the personal estate in the instant case, is, or is not, subject to the impact of the federal estate tax.

* * * *

While the motivating purpose of Congress in creating the marital deduction was undoubtedly to give non-community property states the same estate tax advantages that community property states have, Congress made it very clear by the provisions of 812(e)(1)(E) of the Internal Revenue Code that a spouse's share qualifying for marital deduction might still be subject to federal estate tax. The Treasury Regulations issued to implement such section are proof of the fact that the rule of *Riggs v. Del Drago, supra*, still stands. In other words, Congress expressly left the question, of whether a spouse's share of an estate qualifying for marital deduction should be subject to federal estate tax, to the individual states to determine for themselves.

To the same effect are the observations of (1) the Supreme Court of Virginia in *Baylor v. National Bank of Commerce of Norfolk*, 194 Va. 1, 7, 72 S.E. 2d 282, 285 (1952), which therein held as follows—

The Act of Congress imposing a tax upon the transfer of property from a decedent and authorizing the marital deduction, did not change the applicable state law as to the devolution of property at death. "The intent of Congress was that the federal estate tax should be paid

out of the estate as a whole, and that the distribution of the remaining estate and the ultimate impact of the federal tax should be determined under the state law." *Riggs v. Del Drago*, 317 U.S. 95, 63 S. Ct. 109, 87 L. Ed. 106. 142 A.L.R. 1131.

—and (2) the Supreme Judicial Court of Maine in *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 146–147, 163 A. 2d 538, 543 (1960), which therein held:

Thus far Congress has not seen fit to allocate the burden of the federal estate tax, but has left it to "state law (to) determine the ultimate thrust of the tax." *Riggs v. Del Drago*, 1942, 317 U.S. 95, 63 S. Ct. 109, 112, 87 L. Ed. 106. The testator is free to allocate the burden by provisions of the will, but such provisions do not aid a widow who elects to renounce the will and who cannot thereafter claim its benefits. The door is always open to states to enact apportionment statutes and many have done so. Maine, however, has no such statute. As a matter of judicial policy we do not recognize such a compelling equity in the widow arising from the marital deduction as would lead us to a different construction of the statute which defines her interest.

The United States District Court for the District of Columbia in *Herson v. Mills*, 221 F. Supp. 714, 715–716 (1963), *supra* (which is on all fours with the case at bar, as heretofore pointed out), made a similar observation. The Honorable Burnita Matthews, who sat as the court below, was also the author of the opinion in *Herson*, *supra*. In *Herson* and in the court below, Judge Matthews' holdings were in harmony with these holdings of the highest courts of North Carolina, Wisconsin, Virginia, and Maine, as hereinabove set forth.

2. Contrary to taxpayer's contention, Section 2056(b)(4) of the Internal Revenue Code of 1954 negates and disclaims any intention on the part of Congress that the one-third of the surplus of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703 of the District of Columbia Code should escape any impact of any federal estate tax

Section 2056(b)(4)(A) of the Internal Revenue Code of 1954 provides:

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.*—

* * * * *

(4) *Valuation of interest passing to surviving spouse.*—In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; * * *

In construing Section 812(e)(1) of the Internal Revenue Code of 1939, the precursor of Section 2056(b)(4) of the Internal Revenue Code of 1954, the Supreme Court of Ohio in *Campbell v. Lloyd*, 162 Ohio St. 203, 206, 122 N.E. 2d 695, 697 (1954), certiorari denied, 349 U.S. 911, rehearing denied, 349 U.S. 949, held that "Congress *disclaimed* any intention that the marital deduction should *not* be burdened by the estate tax." (Emphasis supplied.)

The Supreme Court of Wisconsin is in accord. In *In re Uihlein's Will*, 264 Wisc. 362, 371, 59 N.W. 2d 641, 645 (1953), that court held:

Thus the Internal Revenue Code expressly provides that in computing the value of the interest of a surviving spouse for purposes of the marital deduction in determining the federal estate tax *there is to be taken into account the impact of any part of the federal estate tax which falls upon such interest of the surviving spouse.* This provision of the federal estate tax statutes thus would seem to expressly *negate* any intent on the part of Congress that the widow's share of the personal estate in the instant case [widow disavowed will] should entirely escape the impact of all of the federal estate tax. (Emphasis supplied.)

This holding in *Uihlein's Will*, *supra*, was expressly followed by the Supreme Court of Michigan in *Moorman v. Moorman*, 340 Mich. 636, 66 N.W. 2d 248 (1954), and by the Supreme Court of Haw. in *In re Glovers' Estate*, 45 Haw. 569, 371 P. 2d 361 (1962). In *Glovers' Estate*, *supra*, that court held (pp. 577-588, 37 pp. 365-366):

In computing the value of the interest of the surviving spouse for purposes of the marital deduction it is necessary by reason of the provisions of ¶ 2056(b)(4)

of the Internal Revenue Code, above quoted, to take into account any part of the federal estate tax which falls upon the interest of the surviving spouse. Consequently, as is stated in *In re Uihlein's Will*, 264 Wis. 362, 59 N.W. 2d 641, at p. 645, 38 A.L.R. 961: "This provision of the federal estate tax statutes thus would seem to expressly negate any intent on the part of Congress that the widow's share of the personal estate in the instant case should entirely escape the impact of all of the federal estate tax."

The United States District Court for the District of Columbia in *Herson v. Mills*, 221 F. Supp. 714, also so construed Section 2056(b)(4)(A), holding (p. 715):

* * * in determining the amount of the "marital deduction" on the federal estate tax return the law requires that there shall be taken into account the effect the federal estate tax has on the net value of the surviving spouse's interest. 26 U.S.C.A. § 2056(b)(4)(A).

Therefore, it is respectfully submitted that, contrary to taxpayer's contention, Section 2056(b)(4) of the Internal Revenue Code of 1954 *negates* and *disclaims* any intention on the part of Congress that the one-third of the *surplus* of decedent's probate assets which his surviving widow is entitled to receive under Section 18-703 of the District of Columbia Code should escape any impact of any federal estate tax.

3. *Taxpayer's contention (Br. 20, 24) that with the enactment of the marital deduction provisions in 1948 the Congress expressly provided that the surviving spouse, in the case of intestacy or election against the will of a testate decedent should take her statutory share free of any estate tax merely because her distributable share under the descent and distribution statutes of the states qualifies for the marital deduction, is devoid of any merit and flies in the face of the ratio decidendi in the opinions of the Supreme Court in Y.M.C.A. v. Davis and Harrison v. Northern Trust Co.*

It is the position of the Government that taxpayer's contention, oft repeated and reiterated in its brief (pp. 5, 12, 13, 16, 20, 24, 33, 34), to the effect that it was the intention of the Congress in enacting the marital deduction provisions in 1948 that the one-third of the distributable *surplus* of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703, District of Columbia Code (1961 ed.), is free from any impact of any federal estate tax solely because such distributable share qualifies for the marital deduction, is

devoid of any merit and flies in the face of the *ratio decidendi* of the Supreme Court unambiguously enunciated in its opinions in *Y.M.C.A. v. Davis*, 264 U.S. 47 (1924), and *Harrison v. Northern Trust Co.*, 317 U.S. 476 (1943).

Y.M.C.A. v. Davis, 264 U.S. 47, *supra*, and *Harrison v. Northern Trust Co.*, 317 U.S. 476, *supra*, as in the case at bar, involved federal estate taxes. In these two Supreme Court cases, gifts to charities were allowable deductions (pursuant to statutes, precursors to Section 2055 of the Internal Revenue Code of 1954, Appendix, *infra*), as are the value of interests in property of a decedent which pass from him to his surviving spouse under state law (not "terminable") which qualify for the marital deduction under Section 2056 of the 1954 Code. In the Supreme Court cases, as in the case at bar, these deductions are taken from the decedent's statutory gross estate in arriving at his statutory taxable estate upon which the federal estate tax is imposed.

In these two Supreme Court cases, it was therein contended that since the federal estate tax is imposed upon the decedent's statutory taxable estate, and since the charitable gifts as deductions from gross estate had been excluded by the statute from such taxable estate, it was the intent and purpose of the Congress to free these charitable gifts from any impact of any federal estate tax. By substituting the marital deduction allowable under Section 2056 of the Internal Revenue Code of 1954 for the charitable deduction allowable under the predecessors of Section 2055 of the 1954 Code, taxpayer makes the identical contention here. This contention is devoid of any merit because the Supreme Court in *Y.M.C.A. v. Davis*, *supra*, unequivocally rejected it. Mr. Chief Justice Taft, speaking for a unanimous Court, stated (pp. 50-51):

* * * What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death. *Knowlton v. Moore*, 178 U.S. 41, 48, 49.

Congress was thus looking at the subject from the standpoint of the testator and not from the immediate

point of view of the beneficiaries. It was intending to favor gifts for altruistic objects, not by specific exemption of those gifts but by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death. It said to him "if you will make such gifts, we'll reduce your death duties and measure them not by your whole estate but by that amount, less what you give." In § 408 it is declared to be the intent and purpose of Congress that as far as it is practicable and unless otherwise directed by the testator, the tax is to be paid out of the estate before distribution.

There is nothing in subdivision (3) of § 403 which exempts the recipients of altruistic gifts from taxation; it only requires a deduction of them in calculating the amount of the estate which is to measure the tax. It exempts the estate from a tax on what is thus deducted.

* * *

It was wholly within the power of the testatrix to exempt her altruistic gifts from payment of the tax by specific direction to her executor, if she chose. * * * The gifts are and were intended by the testator to be indefinite in amount and to be what was left after paying funeral expenses, attorneys fees, executor's compensation, debts of the decedent and taxes. These donees do not pay the taxes any more than they pay the funeral expenses, the lawyers, the executors and the testator's debts.

To the same effect is *Harrison v. Northern Trust Co.*, *supra*.

In *Herson v. Mills*, 221 F. Supp. 714 (D.C.D.C. 1963), the court stated (p. 715): "* * * it should be noted there is no express provisions in the federal estate tax law * * * which * * * exempts the widow's share from liability [for federal estate taxes]" and moreover, that "there is no law of this jurisdiction [District of Columbia] which * * * exempts the widow's share from liability [for federal estate taxes]." ²²

²² In fact, some states which have enacted apportionment statutes have even expressly provided for no exoneration from federal estate taxes of the share of a decedent's probate assets received by a surviving spouse who, as in the case at bar, had renounced the will of her deceased spouse. *Weinberg v. Safe Dep. & Trust Co.*, 198 Md. 539, 545-546, 553, 85 A. 2d 50, 53, 56 (1951); and *Williamson v. Williamson*, 272 S.W. 2d 72, 74 (Okla. 1954). See *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 147, 163 A. 2d 538, 543 (1960).

We submit that, as summarized by this Court in *Hepburn*, *supra*, 65 U.S. App. D.C., p. 315, 83 F. 2d, p. 572, it was and is the intent of Congress in its enactment of the federal estate tax that—

As to intestate successors the tax is not imposed upon them but precedes them and the fact that they may receive less or different sums because of the statute does not concern the United States.

It is indisputable that neither the federal statutes nor the descent and distribution statutes of the District of Columbia treat gifts to charities, which qualify for the charitable deduction under Section 2055 of the Internal Revenue Code of 1954, any differently from "gifts" from a decedent to a surviving spouse, which qualify for the marital deduction under Section 2056 of the 1954 Code. Accordingly, under the *ratio decidendi* of *Y.M.C.A. v. Davis*, *supra*, and *Harrison v. Northern Trust Co.*, *supra*, we respectfully submit that the one-third of the surplus of decedent's probate assets distributable to his surviving spouse under Section 18-703, District of Columbia Code (1961 ed.), should *not* escape the impact of any federal estate tax.²³

²³ The commentator, Lauritzen, *Apportionment of Federal Estate Taxes*, 1 *Tax Counselor's Quarterly* (1957), cited in the footnote on page 15 of taxpayer's brief, also expressly rejects the contention of taxpayer upon the authority of *Y.M.C.A. v. Davis*, *supra*, as well as upon other authorities, stating (p. 86):

"The argument is always made that the wife [who 'has renounced the will'] should receive her share without paying any portion of the federal estate tax because of the fact that such a share will qualify for the marital deduction. The fallacy of this argument has, of course, been clearly demonstrated by the Supreme Court of the United States in *Young Men's Christian Ass'n* case."

Lauritzen further stated (p. 85):

"* * * it has been forcibly argued that such property [which qualifies for the marital deduction] should bear no part of the tax, because such property does not contribute to determining the amount of the tax. This argument has a superficial logic which is most beguiling. As a matter of law, however, the argument is incorrect and was long ago disposed of by the Supreme Court of the United States. In the case of *Young Men's Christian Association of Columbus, Ohio v. Davis*, the charitable legatees argued that none of the

In view of the foregoing, we further respectfully submit that there is no merit to taxpayer's contention that the Congress, in enacting the marital deduction provisions in 1948 "implicitly expected" (Br. 30) that this Court, by judicial fiat, "must adopt a [so-called] rule of equitable apportionment of the [federal estate] tax" (Br. 5) and thereby free from any impact of such tax the share of the distributable surplus of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703 of the District of Columbia Code (1961 ed.), solely because her distributable share of such surplus "qualifies for the marital deduction" (Br. 20), and in order that "the purpose of the Congress [in enacting the marital deduction] will [not] be thwarted" (Br. 34).

G. The unappealed decision of the United States District Court for the District of Columbia in *In re Estate of Collins*, decided on June 13, 1967, and relied upon by the taxpayer does not refer to or discuss any decision of any District of Columbia court, is in direct conflict with *Herson v. Mills*, *supra*, is contrary to the law as embodied in the jurisprudence of the District of Columbia, and should not be followed

On June 13, 1967, the District Court of the District of Columbia handed down a decision in *In re Estate of Collins*, 269 F. Supp. 633, in which it held that the federal estate tax is not to have any impact upon the distributable surplus of an intestate's probate assets which the intestate's surviving spouse is entitled to receive under the statutes of descent and distribution of the District of Columbia. We will show in this section of our brief that such holding is entirely without merit.²⁴

The intestate in *Collin's*, *supra*, died subsequent to the effective date of the Act of September 14, 1965, P.L. 89-183, 79 Stat. 685, which undertook to codify "Part III, of the District of Columbia Code, 'Decedent's Estates and Fiduciary Relations'" (Sec. 1). As already pointed out, S. Rep. No. 612, 89th

Federal estate tax should be paid from the residue to which they were entitled, because all of such property passing to them was exempt from tax by Federal statute. The Supreme Court denied this contention and pointed out that the property passing to the charities was not exempt from tax; rather, the estate was merely given a deduction equal to the amount of such property in computing such tax. The situation with regard to marital deduction property is precisely the same, and the same rule necessarily applies."

²⁴ It should parenthetically be pointed out that the Government was not a party in *Collins* and had not been apprised of the pendency of that case.

Cong., 1st Sess., p. 3, which accompanied the bill which enacted that law, stated that "It is not the purpose [of this codification] to make substantive changes in the law * * * [but] to reflect * * * only what apparently was the legislative intent, or is implied in the provisions themselves, or has been stated by the [District of Columbia] courts in construing the sections." (Emphasis supplied.)

Section 19-301 of this 1965 codification (District of Columbia Code (1961 ed., Supp. V)), as demonstrated in Subdivision E(1) of our brief, *supra*, provided that before arriving at the surplus personal estate of the intestate which is distributable under Sections 19-302 to 19-314, there shall be deducted from such personal estate of the intestate "the intestate's funeral expenses, debts, costs of administration, and estate * * * taxes * * *." Nevertheless, in the opinion in *Collins*, no reference is made to Section 19-301. Nor is there any reference in the opinion in *Collins* to any cases decided by any courts of the District of Columbia, including this Court. Of course the opinion in *Collins* does not cite or discuss District of Columbia cases which have unequivocally held that the federal estate tax should be treated as an administration expense and that such tax accordingly should be deducted from the probate assets of the intestate before arriving at the distributable "surplus" thereof, within the meaning of "surplus" as written into the statutes of descent and distribution, as set forth in Subdivision E of our brief, *supra*. Moreover, we find upon examination of the petitioner's brief filed in the U.S. District Court for the District of Columbia in the *Collins* case that such brief makes but a single reference to any case decided by any court in the District of Columbia. Such reference in its entirety reads as follows: "Counsel is aware of the decision of *Herson v. Mills*, 221 F. Supp. 714, but submits that it is distinguishable and, if thought to be applicable should not be followed." However, in the opinion in *Collins*, as already pointed out, no mention is made therein, directly or indirectly to *Herson*, *supra*, or to any other District of Columbia case. District of Columbia cases have been completely ignored in the opinion in *Collins*.

Furthermore, there is no specific reference or discussion in the opinion in *Collins* to any of the pertinent provisions of the Internal Revenue Code of 1954 to support the holding in *Collins* that it was the intention of the Congress that an intestate's probate assets which pass from him to his surviving spouse

should be free from any impact of any federal estate tax, merely because the value thereof qualifies for the marital deduction under Section 2056 of the 1954 Internal Revenue Code. We have shown in Subdivisions A, B, C and D of our brief, *supra*, that there are no such provisions in the Internal Revenue Code of 1954.

Cited in the opinion in *Collins* (p. 634) is *Northeastern Nat. Bank v. United States*, 387 U.S. 213 (1967). The issue in that case which was presented to the Supreme Court for its decision was the narrow and restricted question of the meaning of the words "specific portion" in Section 2056(b)(5) of the Internal Revenue Code of 1954. This issue is not involved in the case at bar and this case manifestly is not in point. Moreover, even the isolated quotation in *Collins* (p. 634) from *Northeastern Nat. Bank, supra*, on page 219 of the Supreme Court's opinion, to wit, that "The [marital] deduction was enacted in 1948, and the underlying purpose was to equalize the incidence of the estate in community property and common law jurisdictions" does not support the holding in *Collins*. In this excerpt the Supreme Court merely reiterated that in enacting the marital deduction provisions the Congress intended "to equalize the incidence of the estate tax" (emphasis supplied). Such excerpt moreover does not support the contention of taxpayer that the Congress had enacted the marital deduction provisions for the benefit of the surviving spouse, in order to maximize the quantum of distributable *surplus* of an intestate's probate assets receivable by a surviving spouse (widow or widower), under the laws of descent and distribution of the state in which the intestate was domiciled.

The Supreme Judicial Court of Maine in a very thorough and well-considered opinion in *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 145-146, 163 A. 2d 538, 542-543 (1960), demonstrated the fallacy of this contention of taxpayer as well as the speculations indulged in by the court in *Collins*. That court observed (pp. 145-146, 163 A. 2d, pp. 542-543):

The widow vigorously contends that any result which compels her to bear any share of the burden of federal estate tax is grossly inequitable since that portion of the estate which descended to her qualifies for marital deduction and adds nothing to the tax. This argument has frequently been advanced but has ultimately been rejected by most of those courts which have dealt with the problem. In this connection it is necessary to keep

in mind the nature of the marital deduction. Sec. 2056(a) of the Internal Revenue Code, 26 U.S.C.A. § 2056(a), provides in part that in ascertaining the value of the taxable estate there is deducted from the gross estate "an amount equal to" the interest passing to the surviving spouse (as limited). The words used are words of measure, not of an *exemption* given to the surviving spouse, but of a *deduction* given to the estate. If we could translate the language of the section into terms of ownership we might say that the marital deduction must be thought of as belonging to the estate rather than to the surviving spouse. This concept seems to have guided the court in *Young Men's Christian Ass'n of Columbus, Ohio, v. Davis*, 1924, 264 U.S. 47, 44 S.Ct. 291, 68 L.Ed. 558, a case in which the estate had the benefit of charitable deductions, but the charitable institutions which were residuary legatees were compelled to share the burden of the tax as thus reduced. The court pointed out that the charitable beneficiaries profited much by the charitable deductions but not to the extent of acquiring exemptions. The same underlying concept has relevance in the case of the surviving spouse and the marital deduction. See *Thompson v. Wiseman*, 10 Cir., 1956, 233 F. 2d 734.

The above quotation from *Old Colony Trust Co., supra*, also similarly demonstrates, we submit, that the intent imputed to the Congress in *Collins* (p. 634) by its quotation from *Pitts v. Hamrick*, 228 F. 2d 486 (C.A. 4th 1955), is unsupportable. In any event, such quotation *even in Pitts*, is, at best, *obiter*. It certainly was not the ground upon which the decision in *Pitts* was founded. In *Pitts*, the court based its decision upon the state law of South Carolina, as it deemed it would have been declared by the highest court of South Carolina, since that exact legal issue had not been decided by the latter court. It clearly appears from the opinion in *Pitts*, that the Fourth Circuit based its determination of what the Supreme Court of South Carolina would have declared the law to be (if the issue were presented to it for decision) upon the authority of two cases, *Lincoln Bank & Trust Co. v. Huber*, 240 S.W. 2d 89 (Ky. 1951), and *Miller v. Hammond*, 156 Ohio St. 475, 104 N.E. 2d 9 (1952). In *Pitts* after considering the latter two cases, the court held (p. 490): "while the Supreme Court of the state [South Carolina] has not passed upon the matter, the decision of the probate

court is based upon reason and *may fairly be accepted as evidencing the law of the state.*" (Emphasis supplied.) In *Pitts* the court at great length quoted from the opinion in the Ohio case (pp. 489-490), after stating that the Ohio case "is practically on all fours with the case at bar" (p. 489).

We regret the need of pointing out that this decision of the Ohio court, upon which *Pitts* predicated its determination, had been *reversed* (by a decision in harmony with the decision of the court below in the instant case) thirteen months *earlier* by the same Supreme Court of Ohio in *Campbell v. Lloyd*, 162 Ohio St. 203, 209, 122 N.E. 2d 695, 698-699, to wit, on November 17, 1954. *Pitts* was decided subsequent thereto, on December 30, 1955. Accordingly, it is submitted that the decision in *Pitts*, which had inadvertently relied upon an earlier reversed ruling of the Ohio Supreme Court manifestly should not be followed by this Court. It is interesting to note that *Pitts* was specifically not followed by the Supreme Judicial Court of Maine in *Old Colony Trust Co. v. McGowan*, *supra* (pp. 145, 147, 163 A. 2d, pp. 542, 543).

The only other case relied upon by *Pitts*, as already pointed out, was the Kentucky case of *Lincoln Bank & Trust Co. v. Huber*, *supra*. It is plain that this Kentucky case predicated its decision, as we shall presently show, upon an incontrovertible erroneous *obiter dictum* found in the opinion of a Surrogate of Suffolk County, New York, in *In re Peter's Will*, 204 Misc. 333, 338, 88 N.Y.S. 2d 142, 147 (1949). This Kentucky case held (240 S.W. 2d, p. 91):

Upon the *authority of In re Peters*, above, we conclude that * * * the marital allotment * * * since that item does not add to the tax, * * * cannot be burdened with any portion of the federal estate tax. The surviving spouse [who had disavowed the decedent's will], therefor, should receive her share undiminished by any federal estate tax. (Emphasis supplied.)

The incontrovertible erroneous *obiter dictum* in *In re Peters' Will*, *supra*, referred to above, reads as follows (p. 338, 88 N.Y.S. 2d, p. 147):

Its [Congress'] purpose [in enacting the marital deduction] is to allow a surviving spouse to take a certain portion of the estate free of Federal estate taxes. * * *

* * * * *

I believe that the marital deduction now allowed by Section 812(e) Internal Revenue Code [1939, now Section 2056 of the 1954 Code] is substantially in the same category as the charitable deduction allowed by Section 812(d) of the Code [Section 2055 of the 1954 Code], which immediately precedes it, and that just as a charitable bequest is free of Federal estate taxes, so is a widow's intestate share.

It is indisputable that this erroneous *obiter dictum* was not in anywise essential to support the decision of the Surrogate, who was called upon merely to construe New York statutes which were not even remotely similar to any statute in the Code of the District of Columbia. See the criticism of this erroneous *obiter dictum* in *Weinberg v. Safe Deposit & Trust Co.*, *supra* (pp. 549-550, 85 A. 2d, pp. 54-55). In all events, it is incontrovertible that this *obiter dictum* incorrectly stated the law as declared by the Supreme Court in *Y.M.C.A. v. Davis*, *supra*, and flies in the face of its decision, as we have shown in Subdivision F(3) of our brief, *supra*. The Supreme Court of Hawaii in *In re Glovers' Estate*, *supra* (pp. 578-579, 371 P. 2d, p. 366), and the Supreme Court of Wisconsin in *In re Uihlein's Will*, *supra* (p. 373, 59 N.W. 2d, p. 647), fully support this position of the Government and both of these cases are in complete accord with the detailed analysis of the Court of Appeals of Maryland in *Weinberg*, *supra*, with respect to this erroneous *obiter dictum* in *In re Peter's Will*, *supra*.

The opinion in *Collins* (p. 634) also relied upon the decision of the Kentucky Court in *Lincoln Bank & Trust Co. v. Huber*, *supra*, which in turn, as already pointed out, was based upon this erroneous *obiter dictum* in *In re Peter's Will*, *supra*. This Kentucky decision, we respectfully submit, manifestly should not be followed by this Court. It was expressly *rejected* as an *invalid* authority by the Supreme Court of Wisconsin in *In re Uihlein's Will*, *supra*. Therein that court held (p. 373, 59 N.W. 2d, p. 646):

The reasons advanced by the Kentucky Court for its decision in *Lincoln Bank & Trust Co. v. Huber*, *supra*, are *demonstrably untenable*. (Emphasis supplied.)

This Kentucky case was similarly rejected by the Supreme Court of Hawaii in *In re Glovers' Estate*, *supra*. Therein the court stated (pp. 576-577, 371 P. 2d, p. 365):

The proposition that the purpose and intent of the Congress in establishing the marital deduction is the decisive factor in determining the issue is not acceptable to us * * *.

* * * the conclusion reached in *Huber* * * * that, by reason of the marital deduction, the widow's dower in personalty does not create any federal estate tax, is *unsupportable*. (Emphasis supplied.)

This Kentucky case was also expressly not followed by the Supreme Judicial Court of Maine in *Old Colony Trust Co. v. McGowan*, *supra*. (pp. 145, 147, 163 A. 2d pp. 542, 543).

In view of the foregoing, it is respectfully submitted that since the decision in *Pitts* was (1) inadvertently predicated upon a decision of the Supreme Court of Ohio which had been overruled by the latter court about one year prior to the decision of *Pitts* and (2) was predicated upon a decision of the Court of Appeals of Kentucky, which in turn had based its decision upon an erroneous *obiter dictum* of a Surrogate of Suffolk County, New York, which incontrovertibly is contrary to the decision of the Supreme Court of the United States in *Y.M.C.A. v. Davis*, *supra*, the reliance upon *Pitts* by the court in *Collins* was misplaced.

Also cited in the opinion of *Collins* (p. 634) is *Dodd v. United States*, 345 F. 2d 715 (C.A. 3d 1965). In that case the Court of Appeals for the Third Circuit undertook to construe a decedent's will under the laws of New Jersey. Applying that law in its interpretation of the decedent's will the court found that it was the intention of the testator that his gift to his surviving spouse should be free from any impact of any federal estate tax. Clearly a testator may so provide in his will. However, *Dodd* is not in point, since in the case at bar, the surviving spouse had renounced her deceased spouse's will and had elected to take under the statutes of descent and distribution of the District of Columbia, and it is those statutes alone which determine the value of the decedent's probate assets which had thereunder passed from him to his surviving spouse.

Moreover, the quotation from *Dodd* in *Collins* (p. 634) to the effect that the "marital deduction" was enacted "presumably" with the end in view of maximizing the property which passes from a decedent to his surviving spouse under the descent and distribution statutes of a state is not only *obiter dictum* but, moreover, such *presumption*, as we have already pointed out, does not find any support in any of the provisions

of Section 2056 of the 1954 Internal Revenue Code. In any event, *Dodd* manifestly does not support the holding in *Collins*, which we submit is incorrect. Also cited in the opinion in *Collins*, p. 634, is a quotation from the Supreme Court of Missouri in *Hammond v. Wheeler*, 347 S.W. 2d 884 (Mo. 1961), it is not too dissimilar from that court's quotation from *Dodd*, and for the same reasons does not support the holding in *Collins*.

The last case cited in the opinion in *Collins* is *Gesner v. Roberts*, 48 N.J. 378, 225 A. 2d 697 (1966). This case, as did the *Dodd* case, also involved a construction of a will under New Jersey law. It is not in point.

As already pointed out the repeated generalizations in taxpayer's brief which are similar to the quotations from cases cited in *Collins* and hereinabove discussed do not find support in any specific provision of the Federal Estate Tax Act, and no such provisions have been cited in the brief of taxpayer.

Furthermore, as already pointed out, under the rule in *Riggs*, *supra* (p. 98), it was unequivocally held by the Supreme Court that each state is empowered to govern "the devolution of property at death" and "that Congress intended that the state law should determine the ultimate thrust of the tax". For the District of Columbia, as already shown, the Congress, since 1948 had had many opportunities to change the "devolution of property at death" under the descent and distribution statutes of the District. However, it is incontrovertible, the Congress in its role as the legislative body for the District of Columbia had not made any attempt to create the "equalization" which, pursuant to the rule in *Riggs*, the marital deduction *had made possible* for the District. See *In re Uihlein's Will*, *supra*, 264 Wisc. 376, 59 N.W. 2d 648; *Moorman v. Moorman*, *supra* 340 Mich. 636, 66 N.W. 2d 248, which acknowledges that other legislative bodies have similarly made no such attempt. Furthermore, it is respectfully submitted that the observation of the Supreme Court of Hawaii in *In re Glovers' Estate*, *supra*, rather clearly expresses the actual intention of the Congress in enacting the marital deduction. Therein that court stated (p. 572, 371 P. 2d, p. 363):

The marital deduction was written into the Internal Revenue Code in 1948 in order to equalize, *as nearly as possible*, estate and gift tax liability between community property states and common law states. Senate Rep. No. 1013, 80th Cong., 2d Sess. (1948), 1948 U.S. Code Cong.

Serv. Vol. 2, pp. 1188-1191; S. Misc. Rep. II, 80th Cong., 2d Sess. (1948), No. 1055, p. 5. (Emphasis supplied.)

Similarly cogent and in accord is the observation of the Supreme Judicial Court of Maine in *Old Colony Trust Co. v. McGowan*, *supra*. Therein that court stated (p. 147, 163 A. 2d, p. 543):

* * * we [should] further bear in mind that Congress did *not* provide for this equality with the community property states *but only made it possible* for any state to achieve that equality if it was so minded. (Emphasis supplied.)

In view of the foregoing, it is respectfully submitted that the unappealed decision of the United States District Court for the District of Columbia in *In re Estate of Collins*, *supra*, holding that the share of the distributable "surplus" of the intestate's probate assets which her surviving spouse was entitled to receive under the descent and distribution statutes of the District of Columbia is exonerated from the impact of any federal estate taxes (1) is in direct conflict with *Herson v. Mills*, *supra*, (2) is contrary to the laws and statutes as embodied in the jurisprudence of the District of Columbia, and (3) should not be followed by this Court.

CONCLUSION

For the reasons hereinabove stated, the judgment of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

District of Columbia Code (1961 ed., Supp. IV):

TITLE 18—DECEDENTS' ESTATES AND THEIR DISTRIBUTION

CHAPTER 1.—LAW OF DESCENTS

§ 18-101. *Course of descents generally.*

On the death of any person seized of or entitled to an interest in an estate in lands, tenements, or hereditaments in the District of Columbia, and intestate thereof, the same shall descend in fee simple to such person's surviving spouse, if any, and kindred, who according to the laws of the District of Columbia now or hereafter in force relating to the distribution of the personal property of intestates, would be entitled to the surplus personal property of such intestate, if he or she had died a resident of the District of Columbia and possessed of such surplus personalty; and such surviving spouse and kindred shall take as tenants in common in the same proportions as are or shall be fixed by such laws relating to personal property. Subject to the rights of dower, such real property shall be liable, in the event of insufficiency of the personal property, for the payment of the intestate's funeral expenses, debts, costs of administration, and estate, inheritance, and succession taxes in the same manner and to the same extent as the personal property of such intestate. * * *

Chapter 2.—DOWER RIGHTS

§ 18-211. *Renunciation of devises and bequests to spouse—* * **

(a) Subject to the provisions of section 18-212 a widow or surviving husband shall by such devise or bequest be barred of any statutory rights or interest she or he may have in the real and personal estate of the deceased spouse or the dower rights provided by

section 18-201a, as the case may be, unless within six months after the will of the deceased spouse is admitted to probate, she or he shall file in the probate court a written renunciation to the following effect:

"I, A B, widow (or the surviving husband of _____, late of _____, deceased, do hereby renounce and quit all claim to any devise or bequest made to me by the last will of my husband (or wife) exhibited and proved according to law; and I elect to take in lieu thereof my legal share of the real and personal property of my said spouse * * *

* * * * *

(e) By renouncing all claim to any and all devises and bequests made to her or him by the will of her husband or his wife pursuant to the provisions of subsection (a) of this section, * * *, the surviving spouse shall be entitled to such share or interest in the real and personal estate of the deceased spouse * * * which she or he would have taken had the deceased spouse died intestate, except that in neither event shall the surviving spouse be entitled to more than one-half of the net estate bequeathed and devised by said will, or, if dower be elected, one-half of the net personal estate bequeathed and dower in the real estate devised.

* * * * *

District of Columbia Code (1961 ed.):

Chapter 5.—CLAIMS OF CREDITORS

§ 18-530. *Distribution of residue.*

Whenever it shall appear by the first or other account of an executor or administrator that all the claims against, or debts of, the decedent which have been known by or notified to him have been discharged or allowed for in his account, it shall be his duty to deliver up and distribute the surplus or residue of the personal estate not disposed of by any will, * * *.

Chapter 6.—SALE OF ASSETS

§ 18-609. *Sale of real estate to satisfy debts and legacies.*

If the said probate court shall be satisfied, upon a report of the auditor, that it is necessary to sell said real estate, or part thereof, it shall authorize the same, or so much thereof as may be necessary for the payment of the debts or legacies, or both, to be sold by the executor or administrator, on such terms as the court may direct. Any surplus of the proceeds of such sale, after payment of debts and legacies and costs of administration, shall be deemed real estate, and shall be distributed among the heirs or devisees as the right may appear.

Chapter 7.—DISTRIBUTION OF SURPLUS—
BENEFICIARIES§ 18-701. *Distribution—When to be made.*

When the debts of an intestate, exhibited and proved or notified and not barred, shall have been discharged or settled, or allowed to be retained for as herein directed, the administrator shall proceed to make distribution of the surplus as provided in this chapter.

§ 18-702. *When surviving spouse entitled to whole.*

If the intestate leave a widow or surviving husband and no child, parent, grandchild, brother, or sister, or the child of a brother or sister of the said intestate, the said widow or surviving husband shall be entitled to the whole.

§ 18-703. *When surviving spouse entitled to one-third.*

If there be a widow or surviving husband and a child or children, or a descendant or descendants from a child, the widow or surviving husband shall have one-third only.

§ 18-704. *When surviving spouse entitled to one-half.*

If there be a widow or surviving husband and no child or descendants of the intestate, but the said intestate shall leave a father or mother, or brother or sister, or child of a brother or sister, the widow or surviving husband shall have one-half.

Internal Revenue Code of 1954:

SEC. 2001. RATE OF TAX.

A tax computed in accordance with the following table is hereby imposed on the transfer of the taxable estate, determined as provided in section 2051, of every decedent, citizen or resident of the United States dying after the date of enactment of this title * * *

* * * * *

(26 U.S.C. 1964 ed., Sec. 2001.)

SEC. 2002. LIABILITY FOR PAYMENT.

The tax imposed by this chapter shall be paid by the executor.

(26 U.S.C. 1964 ed., Sec. 2002.)

SEC. 2033. PROPERTY IN WHICH THE DECEDENT HAD AN INTEREST.

The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of the interest therein of the decedent at the time of his death.

(26 U.S.C. 1964 ed., Sec. 2033.)

SEC. 2051. DEFINITION OF TAXABLE ESTATE.

For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the exemption and deductions provided for in this part.

(26 U.S.C. 1964 ed., Sec. 2051.)

SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

(a) *In General.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—

(1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

(3) to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and no substantial part of the activities of such trustee or trustees, or of such fraternal society, order, or association, is carrying on propaganda, or otherwise attempting, to influence legislation; or

(4) to or for the use of any veterans' organization incorporated by Act of Congress, or of its departments of local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

* * * * *

(26 U.S.C. 1964 ed., Sec. 2055.)

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) *Allowance of Marital Deduction.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.*—

* * * * *

(4) *Valuation of interest passing to surviving spouse.*—In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

(26 U.S.C. 1964 ed., Sec. 2056.)

SEC. 2205. REIMBURSEMENT OUT OF ESTATE.

* * * it being the purpose and intent of this chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(26 U.S.C. 1964 ed., Sec. 2205.)

SEC. 6324. SPECIAL LIENS FOR ESTATE AND GIFT TAXES.

(a) *Liens for Estate Tax.*—Except as otherwise provided in subsection (c) (relating to transfers of securities)—

(1) *Upon gross estate.*—Unless the estate tax imposed by chapter 11 is sooner paid in full, it shall be a lien for 10 years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

(26 U.S.C. 1964 ed., Sec. 6324.)

H. Rep. No. 304, 85th Cong., 1st Sess., pp. 1-3:

MODIFYING THE CODE OF LAW FOR THE DISTRICT OF COLUMBIA TO PROVIDE FOR A UNIFORM SUCCESSION OF REAL AND PERSONAL PROPERTY IN CASE OF INTESTACY, TO ABOLISH DOWER AND CURTESY, AND TO GRANT UNTO A SURVIVING SPOUSE A STATUTORY SHARE IN THE OTHER'S REAL ESTATE OWNED AT TIME OF DEATH

The Committee on the District of Columbia, to whom was referred the bill (H.R. 6508) to modify the Code of Law for the District of Columbia to provide for a uni-

form succession of real and personal property in case of intestacy, to abolish dower and curtesy, and to grant unto a surviving spouse a statutory share in the other's real estate owned at time of death, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill, H.R. 6508 do pass.

The purpose of this bill is to modify the Code of Law for the District of Columbia to provide for a uniform succession of real and personal property in case of intestacy, to abolish dower and curtesy, and to grant unto a surviving spouse a statutory share in the other's real estate owned at time of death, and for other purposes.

This bill would make substantial changes in the law relating to the descent of real property when the owner dies intestate. Rights in property known as dower and curtesy are abolished and in lieu thereof each spouse is given a statutory right to share in the deceased spouse's property.

Husbands and wives will be especially affected because the bill proposes to abolish the ancient, feudal rights in realty known as dower and curtesy. Today a healthy widow under 30 years old would get only one-sixth part of the value of any realty of which her husband died intestate. If she were above 77 years old, she's get only one-twentieth part of that value. Under this bill, she would instead take, in either such case, at least one-third and perhaps all the husband's realty, outright, depending upon whether he was survived also by a child or other direct descendants, or only by relatives or more remote degree.

The bill would abolish all present distinctions as between the order of succession in the descent of real property and the distribution of personal property of an intestate. The bill provides that real property shall descend in the same order as personal property, under present law, is distributed. The laws in all States of the Union except Delaware, North Carolina, and Tennessee, provide for uniformity in succession of real and personal property.

Husband and wife domiciled in this District will, under this legislation, acquire exactly reciprocal or equal

rights of inheritance to all property of any kind owned by the one first dying with the possible exception of real estate owned at death but located outside the District of Columbia, which would be governed by the law of its location.

* * * * *

SECTION-BY-SECTION ANALYSIS

Section 1

Section 940 of act entitled "An act to establish a code of laws for the District of Columbia," approved March 3, 1901, as amended (18-101, D.C. Code, 1951 edition), is further amended.

Makes realty descend exactly as personalty now does, including the share to spouse.

* * * * *

Section 5

Amends section 1172 of said code of law (sec. 18-210, D.C. Code, 1951 edition), to extend the present presumption (that any devise or bequest to the widow was intended in lieu of both dower and share of personalty unless otherwise expressed in will) to make the same presumption apply to the old personalty share and to the new realty share and, also, to make the presumption apply to both spouses.

The net effect is to make every surviving spouse (widow or widower), who is given anything under the will of the deceased spouse, renounce if he or she prefers to take her or his intestate share.

Section 6

(1) Amends section 1173 of said code of law, as amended (sec. 18-211, D.C. Code, 1951 edition) (a) to bar either surviving spouse unless he or she renounces anything given him or her by the will of the deceased spouse; and (b) permits husband to renounce as to realty. (It revises renunciation form to fit new mutual situation, which treats widow and widower alike. It gives either spouse statutory rights in real and personal property by renunciation.)

The effect is that by renouncing either spouse surviving (widow or widower) can take her or his full statutory

share of the real or personal property of the deceased spouse.

H. Rep. No. 679, 87th Cong., 1st Sess., pp. 1-4:

AMENDING THE CODE OF LAW FOR THE DISTRICT OF COLUMBIA SO AS TO PROVIDE A NEW BASIS FOR DETERMINING CERTAIN MARITAL PROPERTY RIGHTS

The Committee on the District of Columbia, to whom was referred the bill (H.R. 7265) to amend the code of law for the District of Columbia so as to provide a new basis for determining certain marital property rights, * * *

H.R. 7265, amending the code of law for the District of Columbia to provide a new basis for determining certain marital property rights and for other purposes will: (1) correct deficiencies in the act of Congress approved August 31, 1957 (71 Stat. 560), providing for a uniform succession of real and personal property, * * * (4) clarify provisions relating to renunciation by the surviving spouse, and (5) limit the interest such spouse may take against the will of the deceased spouse.

The 1957 act established a uniform succession to real and personal property by providing that real estate should descend to the decedent's spouse and kindred in the same manner as the personal estate, i.e., that on intestacy the same persons take the real estate, and in the same shares, as they are entitled to the surplus personal property according to the statute of distribution now or hereafter controlling.

Under the law as it now stands, a wife owning substantial real and personal property of her own, and having no relatives closer than nephews and nieces, cannot make a will which will be effective and certain to dispose of any part of her estate other than to her husband because if he survives her he can renounce the will and take her entire estate.

The particular purpose and effect of each section of H.R. 7265 and its relation to the overall remedial design of the bill will appear from the detailed consideration of the sections seriatim as follows:

Section 1 simply identifies the new law as the Marital Property Rights Amendments of 1961 for purposes of reference in certain code sections as they will be amended by this legislation.

Section 2 is substantially the same as in the 1957 law. It establishes a uniform succession of both real and personal property, but expressly provides for the payment of debts, administration expenses and taxes out of the decedent's real property if there is a deficiency of personal property.

Section 4 supplies omissions and eliminates ambiguities in existing provisions of the District of Columbia Code relating to renunciation of devises and bequests, makes such right of renunciation applicable to both spouses and limits the interest of the surviving spouse upon renunciation. * * *

Subsection (e) provides a limitation on the share the surviving spouse filing a renunciation can receive in derogation of the will. There has been substantial criticism of the present law in that, on renunciation, the surviving spouse can in the circumstances of no relatives closer than nephews and nieces, take the entire estate of the deceased spouse and thus wholly defeat the testator's intentions. The bill limits the renouncing spouse to one-half of the net estate, or in the case of election of dower in lieu of the legal share of the real property, to one-half of the net personal property and dower in the real property. A search of the law in the leading common law States in the East and South discloses no other jurisdiction in which the renouncing spouse is permitted to take the entire estate of the deceased spouse against his or her will. This limitation to one-half of the net estate is consistent with the law in most States, including Maryland and Virginia.

of S. Rept. No. 612, 89th Cong., 1st Sess., pp. 1, 3-4, 5, 25, 26, 29, 47, 52:

PART III, DISTRICT OF COLUMBIA CODE, "DECEDENTS' ESTATES AND FIDUCIARY RELATIONS"

The Committee on the Judiciary, to which was referred the bill (H.R. 4465) to enact part III of the District of Columbia Code, entitled "Decedents' Estates and Fiduciary Relations," codifying the general and permanent laws relating to decedents' estates and fiduciary relations in the District of Columbia, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

* * * *

The reasons and justification for the revision and codification of Part III of the District of Columbia Code are contained in House Report 235 on H.R. 4435 and are set forth as follows:

The purpose of this bill is to revise, codify, and enact into law Part III of the District of Columbia Code. The work was undertaken as a part of the project for a new edition of the Code. The first major step of the Committee on the Judiciary in this project, the revision and codification of Part II of the Code, entitled "Judiciary and Judicial Procedure," was enacted as Public Law 88-241.

The primary purpose of this revision is to substitute plain language for awkward terms, reconciliation of conflicting laws, omission of obsolete, superseded, or repealed sections, consolidation of similar provisions, and improvement in the style and arrangement of the material.

It is not the purpose to make substantive changes in the law. While, in a few sections, changes have been made which might at first comparison be considered "substantive," actually it is intended to reflect in those changes only what apparently was the legislative intent, or is implied in the provisions themselves, or has been stated by the courts in construing the sections. In

each case the revision note to the section points out the change and the reason therefor.

This revision is based upon Part III of the 1961 edition of the District of Columbia Code, and supplements, with the addition of a few provisions from other parts which are transferred to improve the arrangement of the Code as a whole.

Before actual revision was begun the following materials were assembled:

1. The complete text of Part III, District of Columbia Code, 1961 edition, and the latest cumulative supplement (Supp. IV).
2. Applicable constructions of the courts.
3. The volumes of the Statutes at Large, for purposes of comparison.
4. Other background materials.

HISTORY

The last code of laws for the District enacted by Congress was that of 1901, as set out in Act March 3, 1901, chapter 854, 31 Stat. 1189. All "codes" published since that time, including the 1961 edition, were consolidations only, and were not enacted by Congress as the basic law of the District.

Actually, the 1901 Code did not contain all the local law applicable in the District at that time. By its own terms (sec. 1 of the act; D.C. Code, 1961 ed., sec. 49-301), in addition to providing for the applicability of the common law, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District, all acts of Congress by their terms applicable to the District and to the other places under the jurisdiction of the United States, in force in the District on March 3, 1901, it provided that all British statutes in force in Maryland on February 27, 1801, should also be applicable in the District "except insofar as the same are inconsistent with, or replaced by, subsequent legislation of Congress." It still so provides. Further, there were a number of prior acts relating to the District the provisions of which were not carried into or repeated in that Code, and which were specifically or impliedly saved

from repeal (unless inconsistent with or replaced by the provisions of the Code) by section 1636 of the 1901 act (31 Stat. 1435). Consequently, later code compilations have been based, not only on the 1901 Code, as amended or supplemented, but also on all prior acts, including sections of the Revised Statutes of the District of Columbia, the Revised Statutes of the United States, and British statutes, which the codifiers considered as still being in force in the District. Some of the British statutes date back to the 13th century.

Over 60 years have passed since the laws relating to the District were overhauled and enacted as a code. Some of the British statutes set out in the 1961 compilation, and prior compilations, while they may have been considered as technically being in force in the District, not only are archaic in language but actually can have no present application in the District, or are obsolete. Others, like many of the other provisions of the 1901 Code and of later independent acts relating to the District, have been repealed, superseded, or affected in some way by subsequent legislation.

There is an urgent need for a new reconciliation and codification of the laws relating to the District, and the revision contained in this bill is the second step in that direction, the revision and codification of Part II of the Code having been the first.

* * * * *

ARRANGEMENT, NUMBERING, AND STYLE

The revision contains the same number of titles as contained in Part III of the 1961 edition of the Code, and uses the same style of section numbering, but chapters within titles are given odd numbers only, leaving even numbers for use in future expansion.

Within the Part as a whole, however, there are transfers of provisions between chapters and titles for the purpose of rearranging the provisions into what was considered a more logical order of subsequent matter and of following the more modern arrangement of similar laws in other jurisdictions. Further, with the same ultimate purpose in view, some sections have been consolidated, and others have been divided respectively in-

to two or more sections or subdivided into subsections.

In addition, every effort has been made to simplify and clarify the language according to the more modern concepts of style.

SECTION 19-113.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-211 (Mar. 3, 1901, ch. 854, § 1173, 31 Stat. 1376; Apr. 19, 1920, ch. 153, 41 Stat. 567; Aug. 31, 1957, Pub. L. 85-244, § 6, 71 Stat. 561; Sept. 14, 1961, Pub. L. 87-246, § 4, 75 Stat. 516).

Based on D.C. Code, 1961 ed., § 18-101 (Mar. 3, 1901, ch. 854, § 940, 31 Stat. 1342; Mar. 6, 1935, ch. 28, § 3(A), 49 Stat. 39; Aug. 31, 1957, Pub. L. 85-244, § 1, 71 Stat. 560; Sept. 14, 1961, Pub. L. 87-246, § 2, 75 Stat. 515).

The provisions of section 18-101 of D.C. Code, 1961 ed., as carried into this section, reflect, with changes in phraseology and arrangement, the amendment thereof by the 1961 Act.

SECTION 19-302.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-702 (Mar. 3, 1901, ch. 854, § 374, 31 Stat. 1249; Apr. 19, 1920, ch. 153, § 1, 41 Stat. 563).

Changes are made in phraseology.

SECTION 19-303.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-703 (Mar. 3, 1901, ch. 854, § 375, 31 Stat. 1249; Apr. 19, 1920, ch. 153, § 1, 41 Stat. 563).

Changes are made in phraseology.

SECTION 19-304.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-704 (Mar. 3, 1901, ch. 854, § 376, 31 Stat. 1249; Apr. 19, 1920, ch. 153, § 1, 41 Stat. 563).

Changes are made in phraseology.

SECTION 20-1108.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-609 (Mar. 3, 1901, ch. 854, § 148, 31 Stat. 1214).

Changes are made phraseology.

SECTION 20-1328.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-530 (Mar. 3, 1901, ch. 854, § 359, 31 Stat. 1247).

Changes are made phraseology.

FOOTNOTE 15 REFERENCE IN TEXT

Maryland and Virginia, we will presently show here, at different times adopted differing, varied and inconsistent apportionment statutes. In Maryland the original apportionment statute enacted in 1937 provided for the "apportionment of the Federal estate tax [only] against *inter vivos* transfers includible in the taxable estate." Thereafter, in 1947, this statute was first amended so as to provide that "the widow's share of the nonprobate estate was exonerated, but her share of the probate assets continued to bear a [federal estate] tax burden." However, "If the wife renounced the will, there was no exoneration" even as to nonprobate assets. (Appendix C to Taxpayer's Br., p. 21.) Moreover, as herein pertinent, in *Weinberg v. Safe Deposit & Trust Co.*, 198 Md. 539, 85 A. 2d 50 (1951), in which, as in the case at bar, a widow had disavowed the will of her husband, the Court of Appeals of Maryland expressly refused, by judicial fiat, to create a rule of apportionment which would exonerate from federal estate taxes the property passing from decedent to his surviving spouse. Six years after the decision in *Weinberg*, to wit, in 1957, the Maryland apportionment statute was amended for a *second* time. It now provided that "a widow electing against the will was exonerated [only] as to nonprobate assets." (Appendix C to Taxpayer's Br., p. 21.) In the case at bar, the decedent's non-probate assets are about 0.44 per cent of decedent's probate assets and no part of these non-probate assets had passed to decedent's surviving spouse.

(JA 34-35.) Even the Maryland statute as thus amended in 1957 would not have permitted taxpayer to achieve its end in the case at bar. It was not until 1965, when Maryland amended its apportionment statute for a *third* time, that it provided "for full exoneration of property passing to a surviving spouse to the extent it qualifies for the marital deduction." (Appendix C to Taxpayer's Br., p. 21.) Taxpayer is urging this Court, we submit, unmeritoriously, by judicial fiat to create and adopt an apportionment rule which the legislature of Maryland finally adopted, it is indisputable, only after twenty-seven years of haggling over public policy.

In Virginia the original apportionment statute was enacted in 1946. In 1952 it was amended for the *first* time. As thus amended it expressly provided that the apportionment rule "did *not* apply with respect to the benefit of the marital deduction allowable." (Emphasis supplied.) (Appendix C to Taxpayer's Br., p. 29.) In 1954 this apportionment statute was amended for the *second* time. It provided that the "Federal estate tax is apportionable against the marital deduction allowance." (Appendix C to Taxpayer's Br., p. 29.) Of course, under the rule in *Riggs*, state legislatures have the power to enact such statutes and as we have demonstrated in Appendix *infra*, pp. 76-78, state legislatures frequently have exercised such power *only after* the highest court of the particular state has refused by judicial fiat to adopt and create such rules of apportionment. In essence, taxpayer is asking this Court in effect to usurp the prerogatives of the legislature, which it is apparent courts have refused to do.

FOOTNOTE 16 REFERENCE IN TEXT

As we have indicated above, it appears that about twenty-nine states have adopted apportionment statutes and it is *incontrovertible that these apportionment statutes differ from each other*. (See Appendix C to Taxpayer's Br., pp. 17-30.) As already pointed out, *supra*, *only* North Dakota has adopted the Uniform Estate Tax Apportionment Act and that occurred in 1967. In Appendix, *supra*, pp. 75-76, we have shown the differences in the apportionment statutes of Maryland and Virginia during the period from 1937 until 1965. We will present-

ly set forth the material differences in the apportionment statutes of the other twenty-six states and show that most of these apportionment statutes were enacted only after the courts of the respective states had refused by judicial fiat to create and adopt a rule of apportionment of federal estate taxes.

The apportionment statutes of Alabama and Iowa expressly prohibit "apportionment of the Federal estate tax absent testamentary direction" "to the contrary." (Appendix C to Taxpayer's Br., pp. 17, 19.)

The apportionment statute of Massachusetts "provides for apportionment as to nonprobate assets but no apportionment as to probate assets." (*Id.*, p. 21.)

The apportionment statute of Kansas provides only for the "apportionment of 'state estate tax'." (*Id.*, p. 20.)

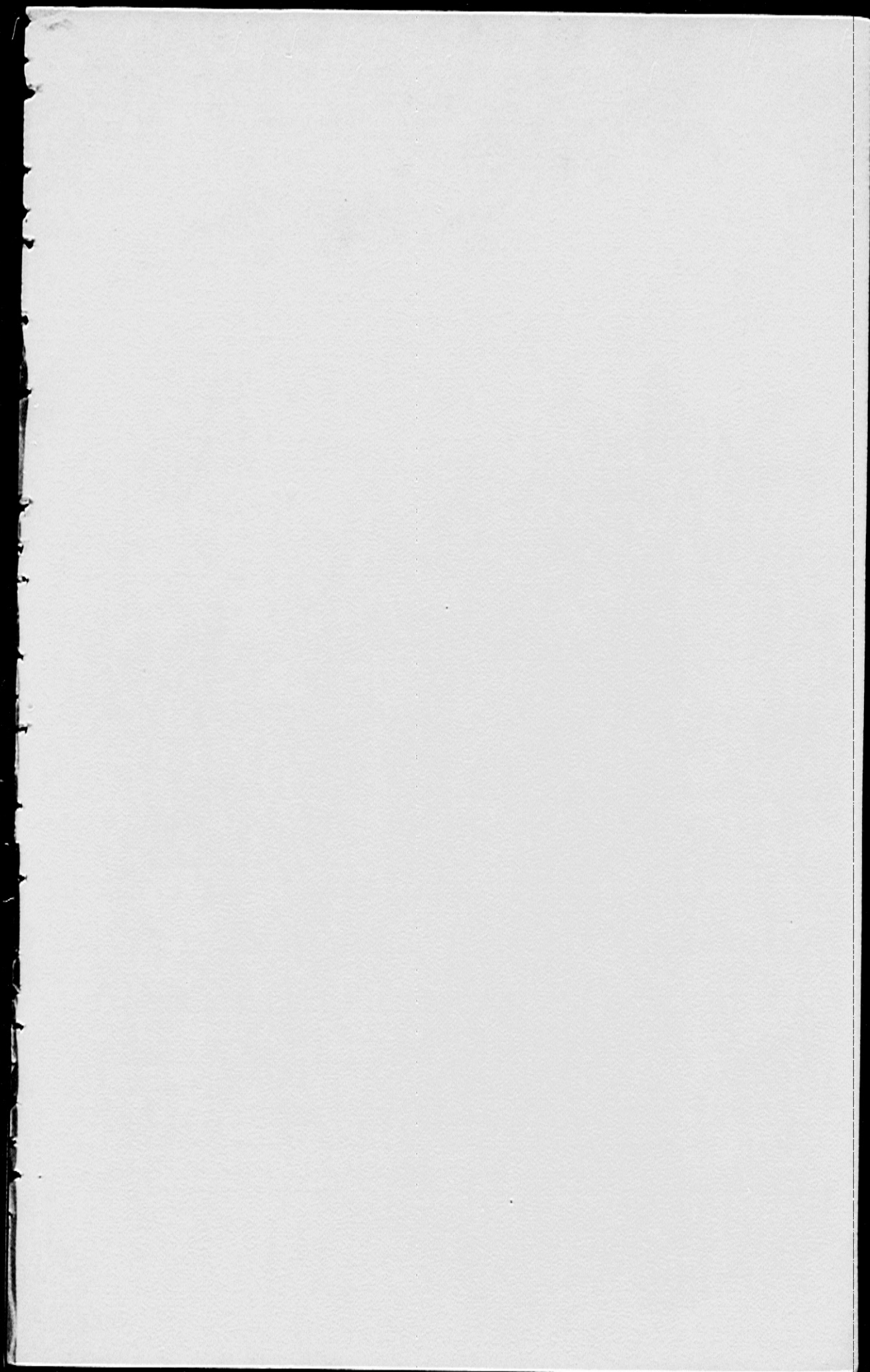
North Carolina and Oregon adopted apportionment statutes which are "limited to [a] widow electing against the will and provides that to the extent her share qualifies for the marital deduction under the Federal estate tax law, it is free of estate tax." (*Id.*, pp. 25, 27.) Taxpayer concedes that the North Carolina statute was enacted "Obviously to overcome the *Wachovia* decision [*Wachovia Bank and Trust Co. v. Green*, 236 N.C. 654, 73 S.E. 2d 879 (1953)]" (*Id.*, p. 25), which is on all fours with the case at bar. In *Wachovia*, the Supreme Court of North Carolina had expressly refused by judicial fiat to create and adopt a rule for apportioning federal estate taxes. Furthermore, taxpayer concedes (Br. 23) that in *Wachovia* that court held that the word "surplus" "as adopted by the State Legislature [which is also written into the statutes of the District of Columbia], meant that which remained of the estate after payment of 'all expenses of administration and debts including taxes'; stated that the subsequent 1948 Federal statute could not in any way change the meaning of an enactment of the State Legislature; and concluded that whether any change should be made in the manner of distribution to the widow 'is a matter for the General Assembly.'"

The apportionment statutes in California, Connecticut, Louisiana, Massachusetts, Michigan (*Moorman v. Moorman*, 340 Mich. 636, 66 N.W. 2d 248 (1954), *supra*), Minnesota, New Hampshire (Br. 13), New York (Br.

10), Oklahoma, Pennsylvania (Br. 11), South Dakota, Tennessee, and West Virginia were enacted *only after* the courts of those respective states had by judicial fiat refused to declare and adopt a rule of apportionment (Appendix C to Taxpayer's Br., pp. 17, 18, 20, 21-22, 22, 26-27, 28, 29, 30).

Other differing apportionment statutes were also enacted at various times by the Legislatures of Arkansas, Florida, Delaware, Nebraska, Nevada, and Wyoming. (Id., pp. 17, 18, 23, 30.)

The apportionment statute of Massachusetts provides for apportionment as to nonprobate assets but no apportionment as to probate assets. (Id., p. 21.) The apportionment statute of Kansas provides only for the apportionment of state estate tax. (Id., p. 20.) North Carolina and Oregon adopted apportionment statutes which are "limited to [a] widow electing against the will and provides that to the extent her share shall first for the marital deduction under the Federal estate tax law is free of estate tax." (Id., pp. 25, 27.) Taxpayer concedes that the North Carolina statute was upheld. Obviously to overcome the Wisconsin decision [Hickson Bank and Trust Co. v. Green, 236 N.W. 654, 78 F.2d 579 (10th Cir. 1923)], which is on all fours with the case at bar. In Wisconsin the Supreme Court of North Carolina had expressly refused by judicial fiat to create and adopt a rule for apportioning Federal estate taxes. Furthermore, taxpayer concedes (Br. 27) that in Wisconsin that court held that the word "surviving" as adopted by the State Legislature (which is also written into the statute of the District of Columbia), meant that which remained of the estate after payment of all expenses of administration and debts including taxes; stated that the subsequent 1948 Federal statute could not in any way change the meaning of an enactment of the State Legislature; and concluded that whether any change should be made in the manner of distribution to the widow is a matter for the General Assembly. The apportionment statutes in California, Connecticut, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, and West Virginia were enacted *only after* the courts of those respective states had by judicial fiat refused to declare and adopt a rule of apportionment (Appendix C to Taxpayer's Br., pp. 17, 18, 20, 21-22, 22, 26-27, 28, 29, 30).



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REPLY BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR AND THE RIGGS NATIONAL BANK OF
WASHINGTON, D. C., AS EXECUTORS OF THE ESTATE
OF CHARLES DELMAR, DECEASED, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

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District Court

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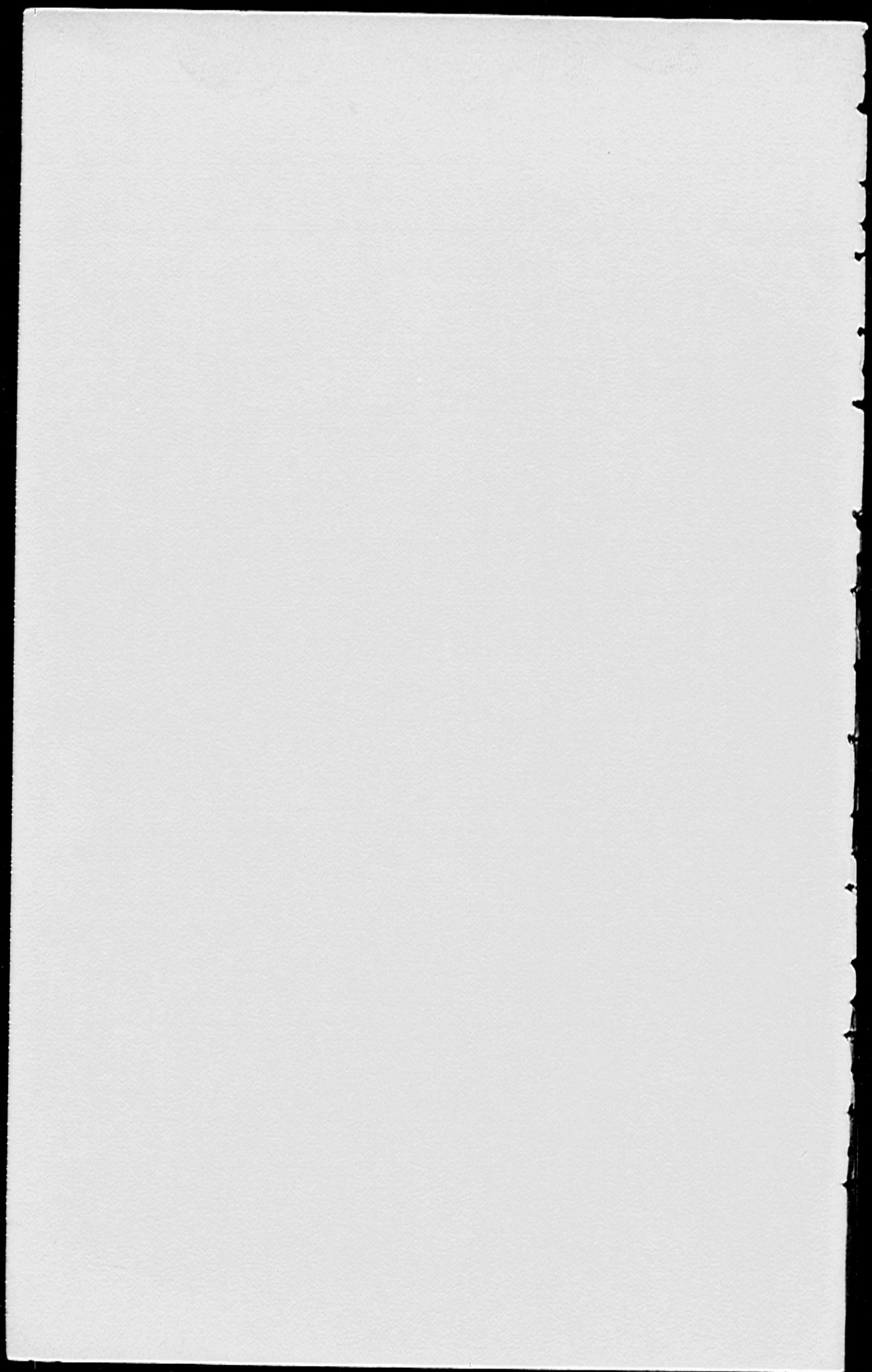
Washington, D. C. 20006

United States Court of Appeals
For the District of Columbia Circuit

FILED OCT 26 1967

Marion J. Paulson
CLERK





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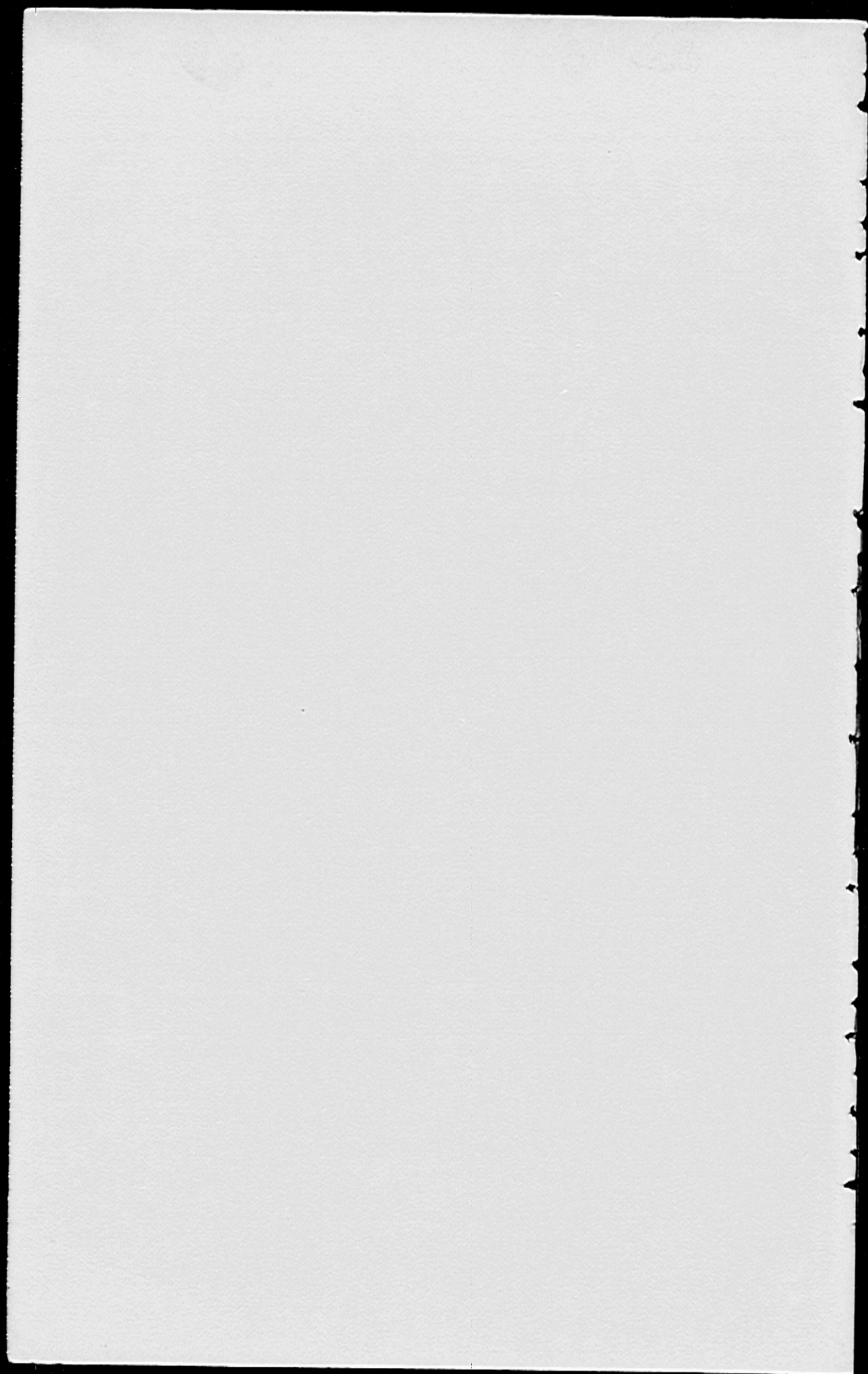
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v.

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On Appeal From Order and Judgment of the United States
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REPLY BRIEF FOR APPELLANTS

COUNTERSTATEMENT OF CASE

In its brief (hereinafter referred to as "Br.") at page 3, the Government* asserts the Taxpayer's* position herein to be that the share of the surviving spouse is one-third of the surplus remaining *prior* to the deduction of funeral expenses, debts, claims, administration expenses and federal and District of Columbia estate taxes. In this, the Government patently errs; the position of the Taxpayer is that, to conform to the Congressional intent, the share of the surviving spouse is to be determined *after* deducting funeral expenses, debts, claims and administra-

* Appellee is herein referred to as the "Government" while Appellants are referred to as the "Taxpayer."

tion expenses, but *before* federal and District of Columbia estate taxes.

On page 4, the Government refers to the "legal share of the decedent's probate assets which the executors distributed * * *." Nothing in the record indicates that any distribution has been made to the surviving spouse.

Also on the same page in footnote 7, the Government asserts that the testamentary provision for the surviving spouse was a trust "with a *limited* power of appointment." The record (JA 31) indicates that such power of appointment was a *general* one.

On page 6, the Government, after quoting by way of footnote certain colloquy between the bench and counsel, continues that "no opinion was written by the court below" indicating a brusque dismissal of Taxpayer's motion. That the Court, notwithstanding its prior decision in *Herson v. Mills*, was in complete sympathy with the Taxpayer's position is indicated by its following statements (JA 49):

"The Court: * * * I think they ought to treat common law jurisdictions exactly the same as they do the others, but—"

and (JA 48):

"The Court: As for the Court making a rule about apportioning the federal estate tax, one of our Judges in a case a short time ago thought that a stepchild was an heir of a decedent and this question went to the Court of Appeals.

"In the interval between the decision in the District Court and the time the Court of Appeals reversed, however, petitions were received in the Probate Office in estates where people who were stepchildren of the decedent were claiming to be heirs.

"* * * This caused confusion and uncertainty.

"I mention this because in the instant case a decision that the Court may apportion the estate tax and exempt the widow from sharing the tax would mean that the

decision in this particular case would have to be dealt with in other cases in the Probate Office before the matter could be passed upon by the Court of Appeals.
* * *

"I think, *under the circumstances*, that I will have to deny your motion, Mr. Brown." (Italics supplied.)

ARGUMENT

Stripped of repetitious verbiage, the Government's position, with respect to District of Columbia decedents, may be distilled into five propositions:

(a) That the federal estate tax, under common law principles, "is in the nature of an administration expense" which, in intestate estates, must be set off before the shares of the distributees may be determined;

(b) That the Congress has approved such for the District of Columbia by its failure to enact a statute specifically providing for a different result;

(c) That in the absence of a Congressional enactment of such a local statute, the local courts cannot reach a contrary result;

(d) That the 1961 amendments to the provisions of the local descent and distribution statutes establish a Congressional intention that the share of a surviving spouse is to be burdened by a part of the federal estate tax; and

(e) That *In re Estate of Collins*, 269 F. Supp. 633 (1967), reaching a contrary result, was erroneously decided.

In support of its propositions, the Government repeatedly and in various contexts treats as being controlling certain *state* court decisions dealing with the meaning of terms contained in various *state* statutes of descent and distribution. In so doing, the Government fails to give recognition to the distinction between the relationship of the

Congress to the local laws of the various states and its relation to the District of Columbia with respect to the local laws of the same.

Replying to the Government's contentions, and, in so doing, following the format of the latter's brief, Taxpayer would note the following:

A. The Government Asserts That the Federal Estate Tax Is Imposed Solely on the Decedent's Interest in Property Which Has Ceased by Reason of His Death. (Br. 11-12)

With this principle, Taxpayer has no disagreement but asserts that it is without significance. Thus, in the 34 states (Taxpayer's Br. 22), where by decision or local statute the share of the surviving spouse is exonerated from the tax, this principle is *also there* applicable.

B. The Government Asserts That the Federal Estate Tax Is a Lien Which Attaches to the Decedent's Gross Estate at the Precise Moment of His Death. (Br. 12)

With this principle, which is also without significance, Taxpayer expresses no disagreement but would again note that the *same* principle is applicable in the 34 states where the share of the surviving spouse is exonerated from the tax.

C. The Government Asserts That the Federal Estate Tax Due From the Estate of an Intestate Decedent "Is of the Nature of an Administration Expense" Which, Under the Common Law Prevailing in the District of Columbia, as Enunciated in *Hepburn v. Winthrop*, *Infra*, Is To Be Paid by the Administrator Substantially as Other Charges Are Paid Prior to Ascertainment of the Intestate Share and Its Distribution. (Br. 13-18)

In this connection, Taxpayer would first correct the untrue assertion made by the Government (Br. 14-15) that Taxpayer contends that *Riggs v. Del Drago* "has nullified * * * the decision of this Court, *Hepburn v. Winthrop*, * * *." Taxpayer, at pages 14-15 of its brief, asserted

nothing more than that the "basis" of that decision was destroyed "at least to the extent of its reliance upon" certain decisions, the bases of which were "nullified" by the Supreme Court in *Riggs v. Del Drago*, and its reliance upon the "necessary inference" resulting from the statutory provision that the tax is to be paid by the executor before distribution, which inference was totally discredited by the same Supreme Court decision. Nor does Taxpayer retreat from *that* position—for if *Hepburn v. Winthrop* is to stand for a *general* rule against apportionment, the result must be supported by a different line of reasoning than that upon which the Court therein rested its conclusion.

Taxpayer admits, as it must, that in a proceeding involving a *testate* estate and *not* involving the marital deduction provision, this Court, in *Hepburn v. Winthrop*, in refusing to apportion to realty any of the federal estate tax, characterized the latter as being "of the nature of" an administration expense. In so doing, however, it merely applied the general rule that, in default of testamentary provision to the contrary, debts, charges and other just obligations of an estate, including expenses of administration, must be paid out of the residue of the property to which the executors or administrators take title. The Court continued that (83 F. 2d at 573):

"* * * in the absence of anything in the [taxing] statute creating the exception urged here and in the absence of any provision in the will directing a contribution from the real estate and in the absence of a local statute on the subject, it is clear that the payment of the tax [must be made] out of the personal residuary estate * * *."

Such cannot be the basis of a decision herein.

With respect to the "splitting" provisions adopted for federal estate and gift tax purposes by the Revenue Act

of 1948, H. Rept. No. 1274, 80th Cong., 2nd Sess. (1948-1 C.B. 241, 244), states that:

“* * * In effect, these amendments represent the adoption of a *new national system for ascertaining Federal estate and gift tax liability*. * * *” (Italics supplied.)

and (*ibid.*, p. 261) that:

“* * * In the case of the estate tax, ‘splitting’ means an *exemption** in common-law States of up to one-half of the decedent’s estate if it passes outright to the surviving spouse. * * *” (Italics supplied.)

It is incontrovertible, therefore, that the Congress legislated to the end that there be uniform estate tax treatment for residents of common law and community property states *for the purpose of correcting inequities and to provide for tax equalization*. S. Rept. No. 1013, 80th Cong., 2nd Sess. (1948-1 C.B. 285). This intent has been repeatedly recognized by the United States Supreme Court. Thus, in *United States v. Stapp*, 375 U.S. 118, 128 (1963), the Court stated as follows:

“* * * The 1948 tax amendments were *intended to equalize the effect of the estate taxes* in community property and common-law jurisdictions. Under a community property system, such as that in Texas, the spouse receives outright ownership of one-half of the community property and only the other one-half is included in the decedent’s estate. To equalize the incidence of progressively scaled estate taxes and to adhere to the patterns of state law, *the marital deduction permits* a deceased spouse, subject to certain requirements, to *transfer free of taxes one-half of the non-community property to the surviving spouse*. * * * *the primary thrust of this is to extend to tax-*

* Substantially so treated in *In re Estate of Rooney*, 186 Kan. 200, 349 P. 2d 916 (1960), as to which see *First National Bank of Topeka, Kansas v. United States*, 233 F. Supp. 19, 28-29 (D.C. Kan. 1964). Taxpayer submits that the term “exemption” is particularly descriptive of the Congressional intention with respect to the District of Columbia.

payers in common-law States *the advantages* of 'estate splitting' otherwise available only in community property States. * * * (Italics supplied.)

The Court in *Jackson v. United States*, 376 U.S. 503, 510 (1964), stated that:

"* * * the general goal of the marital deduction provisions was to *achieve uniformity of federal estate tax impact* between those States with community property laws and those without them. * * * (Italics supplied.)

In *Northeastern Pennsylvania National Bank & Trust Company v. United States*, ... U.S. ..., 18 L. ed. 2d 726, 731, 732 (1967), that Court, in the following language, reiterated that Congressional purpose:

"* * * The deduction [marital] was enacted in 1948, and the underlying purpose was to *equalize the incidence of the estate tax* in community property and common-law jurisdictions. Under a community property system a surviving spouse takes outright ownership of a half of the community property, which therefore is not included in the deceased spouse's estate. *The marital deduction allows transfer of up to one-half of noncommunity property to the surviving spouse free of the estate tax.* * * *

"Congress' intent to afford a liberal 'estate-splitting' possibility to married couples, where the deductible half of the decedent's estate would ultimately—if not consumed—be taxable in the estate of the survivor, is *unmistakable.* * * * (Italics supplied.)

It is a cardinal rule of statutory construction that that which arises by plain and clear implication from legislation is as much a part thereof "as if the implication had been embodied in so many words." See *McHenry v. Alford*, 168 U.S. 651, 652 (1898), and *Wilson County v. Third National Bank of Nashville*, 103 U.S. 770, 778 (1881). The

"unmistakable" intent and purpose of the Congress to make available to all common-law jurisdictions—including the District of Columbia—full uniformity of federal estate tax impact with that prevailing in community property states serves to distinguish any principle resting on *Hepburn v. Winthrop* from the situation here involved, since here there is no "absence of anything in the [taxing] statute creating the exception urged." While achievement of full uniformity,* as the result of *Riggs v. Del Drago*, necessarily depends, as to the several states, upon application of their local law, it is unbelievable that the Congress did not intend such full uniformity to be achieved with respect to District of Columbia decedents. To hold to the contrary requires the singular conclusion that with respect to its "local" inhabitants, Congress, in a single statutory pronouncement intending to give, inadvertently failed to do so, or that it simultaneously gave and took away.

Nor is this Court, by *Hepburn v. Winthrop*, prevented from achieving, in application, the Congressional intent merely because the Congress failed to enact an apportionment statute for the District of Columbia clearly spelling out how its intent, with respect to the marital deduction allowance, was to be here achieved.

As stated in *In re Gallagher's Will*, 57 N.M. 112, 255 P. 2d 317, 37 A.L.R. 2d 149, 162 (1953):

"* * * there is nothing in the Act of Congress to hamper the state [District of Columbia] courts, in the exercise of their jurisdiction over the administration and settlement of estates, from applying equitable rules whereby, as the result of case law, equitable apportionment of this tax is accomplished * * *."

* And such achievement has been defeated in several states (Br. 17, fn. 12) predicated upon reasoning not here applicable as to which see Taxpayer's brief (pp. 22-23).

Thus, in the language of *Gesner v. Roberts*, 212 A. 2d 43, 49 (Super. Ct. N. J. 1965), *aff'd* 225 A. 2d 697 (Sup. Ct. of N.J. 1967):

"It would seem then the *Congress* in granting to the states [and to the District] the right to determine where the burden of federal estate taxes should lie, *implicitly expected* that common law states [jurisdictions] such as ours would determine either by legislation or *judicial decision* that the *full* benefit of the marital deduction would be accorded where applicable to the surviving spouse. * * *" (Italics supplied.)

Further, in the language of *Pitts v. Hamrick*, 228 F. 2d 486, 489 (4 Cir. 1955):

"* * * There is no reason why the apportionment may not be made by the courts of the state [District] in application of what they conceive to be the requirements of state [District] law in the premises as well as by its legislature. * * *"

See also *Seymour National Bank v. Heideman*, 278 N.E. 2d 771 (Ind. 1961).

In conclusion on this point, Taxpayer submits that the Congress having the sole power to decide what the policy of the District of Columbia law shall be and having indicated its will, however indirectly, that will should be recognized and obeyed by the courts. As stated by the Supreme Court in *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 118 (1957):

"* * * it will not do for us to tell the Congress 'We see what you were driving at but you did not use choice words to describe your purpose.'"

See also Taxpayer's Br. 31-32.

D. 1. The Government Asserts (Br. 18-21) That It Is Clearly the Congressional Purpose and Intent That the Federal Estate Tax Should Be Paid by the Executor or Administrator "Before Making Any Distribution" of the Probate Assets "Unless Such Taxes Are Otherwise Provided For in the Will or Apportioned Under a Pertinent State Statute."

To this enigmatic assertion, the Taxpayer agrees it to be the Congressional intent that "so far as is practicable" the tax "shall be paid out of the estate before its distribution." The instant issue, however, involves not *when* distribution should be made but *whether* the estate tax payment will effect the amount *distributable* to the surviving spouse of a District of Columbia intestate. As to the latter, while a "pertinent state statute" will have effect *where such a state problem is involved*, the instant problem deals *not* with a state but with the District of Columbia for which the Congress is also the local legislature.

In support of its assertion, the Government (Br. 18) cites section 2205 of the 1954 Code [section 826(b) of the 1939 Code] as authority for the proposition that "unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution." It is submitted, however, that this statutory provision has no significance on the question of *whether* the estate tax payment will effect the amount *distributable* to a surviving spouse.* That section, said *Riggs v. Del Drago*, "does not command that the tax is a non-transferable charge" on any particular property and that to read the phrase "the tax shall be paid out of the estate" as meaning "the tax shall be paid out of" any particular portion of the estate "is to distort the plain language of the section and to create an obvious fallacy."

On this point, the Government concludes with the proposition (Br. 21) that since the Congress had the

* This conclusion was reached in *Hampton v. Hampton*, 188 Ky. 199, 221 S.W. 496, 10 A.L.R. 515, 517 as early as 1920 in apportioning the estate tax liability of an intestate.

power, with respect to the District of Columbia, to enact an apportionment statute exonerating the share of the surviving spouse from the tax impact and has "chosen not to" do so, the Congressional intention is clear that no such exoneration shall prevail in the District of Columbia.

It is clear that here, as in *Northeastern Pennsylvania National Bank & Trust Company v. United States*, *supra*, resolution of the question presented is either "essentially" (Majority Op.) or "exclusively" (Dissenting Op.) a matter of discovering the intent of Congress. It is submitted that to sustain the Government's position herein, on the failure of the Congress to adopt for the District of Columbia an apportionment statute, is to disregard the clear and unquestioned purpose underlying the enactment of the marital deduction provision (as applicable in the District of Columbia) and to characterize the Congress as either an inept body unable, with respect to the District of Columbia, to effectively express its purpose or as an "Indian giver."

Any conclusion that in the District of Columbia the share of the surviving spouse otherwise qualifying for the marital deduction must be determined to be an "after-tax" share gives rise to a singular result squarely contrary to the stated purpose of the marital deduction provision and obviously contrary to the universally-recognized intent of Congress. Undoubtedly, under the Congressional power with respect to the District of Columbia, it was within the competency of the Congress to *expressly* provide for the District, absent a contrary testamentary provision, that property bequeathed, devised or passing (as in the case of intestacy) to the surviving spouse should be exonerated from any estate tax burden so long as the amount thereof did not exceed one-half of the adjusted gross estate. In light of the Congressional purpose to provide full tax equalization with the community property states, however, its failure to adopt a local apportionment statute gives rise to the clear and unmistakable implication that it

believed none to be required to effect its purpose for its District of Columbia citizens. Having made clear, however indirectly, what the policy of the District of Columbia law should be, that policy should be recognized and obeyed by the local courts. Taxpayer's Br. 31-32, and *United States v. Union Pacific Railroad Co.*, *supra*.

D. 2. The Government Asserts That It Is the Province of the Congress Which Enacts the Statutes for the District of Columbia To Determine Whether It Should Be the Public Policy of the District That a Widow Who Elects Against the Will Should Receive Her Portion of the Decedent's Estate Free From Any Impact of the Federal Estate Tax. (Br. 22)

By this assertion, it is obviously the position of the Government that in the District of Columbia the question of apportionment may be resolved *only* by express and explicit Congressional legislation. The Government overlooks the fact, however, that under section 49-301 of the District of Columbia Code, the common law and principles of equity remain in force in the District except insofar as the same are inconsistent with or are replaced by legislation of the Congress.

Congress has clearly expressed *its* intent that unless otherwise prevented by the will of the testator or, otherwise on a national scale by a local *state* statute, one-half of a decedent's adjusted gross estate would be "allowed" to pass to the surviving spouse free of tax so as to equate common law jurisdictions with community property states. Congress having enacted no express legislation for the District of Columbia dealing with the apportionment of the federal estate tax, the question is whether the local courts in the application of "the common law and principles of equity,"* are prevented from effecting the clear and unquestioned Congressional purpose. It is submitted that

* Repeatedly (17 times) characterized by the Government as "judicial fiat" in an apparent attempt to attach thereto an opprobrious connotation.

application of the equitable rule of apportionment to free the surviving spouse's share of the estate from the burden of the tax is *wholly consistent with* the Congressional legislation and should be applied.

In support of its position that the rule of equitable apportionment can apply in the District of Columbia only by the adoption of specific Congressional legislation, the Government refers to a *minority* line of *state* court decisions,* the substance of which is that *in the states*, the question of whether or not a surviving spouse who elects against a will should be wholly relieved of the burden of the federal estate tax is a matter which should be left to state *legislative* determination. As noted in Taxpayer's brief (pp. 22-23), however, the cited decisions all appear to involve positions taken by state courts (prior to the enactment of the marital deduction provision) that under their descent and distribution statutes, the estate tax was deductible before determining any distributable amount. Their underlying rationale is that the state legislature having adopted legislation, the meaning of which had previously been established by state court decision, such meaning could not be changed by subsequent federal legislation dealing with the federal estate tax where the purpose of the Congress was to leave to each state the question of its impact. Indeed, the Supreme Court of North Carolina in *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 659, 73 S.E. 2d 877, 883 (1953), appears to take the position that even if Congress did not intend to leave this question to each state, it was necessarily required to so do. Thus, the Court stated that:

"The federal tax statute as amended which makes provision for marital deduction does not have the effect of controlling the *state statutes* as to the administration of decedent's estate. Power in this respect

* 9 as contrasted to 16 reaching the opposite result. See Taxpayer's Br. 21-22.

*has not been granted to the Federal Government, and the right of state control is reserved (10th Amendment) * * *.*" (Italics supplied.)

Predicated, as they essentially are, upon the inability of the Congress to change, by national legislation, the prior interpretation of an existing state legislative provision (Taxpayer's Br. 22-23), the rationale of these decisions is not applicable herein.

Under Article I, section 8, cl. 17, of the Constitution, Congress possesses, with respect to the District of Columbia, "not only every appropriate national power, but, in addition, all the powers of legislation which may be exercised by a state in dealing with its affairs, so long as other provisions of the Constitution are not infringed." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434-435 (1932). Further, every general statute of the United States not inapplicable in the District of Columbia and not inconsistent with, or replaced by, subsequent legislation of Congress applies in the District of Columbia with the same force and effect as elsewhere. Section 49-301, District of Columbia Code (1961 ed.), and see *Nuckols et al. v. United States*, 99 F. 2d 353, 354 (C.A. D.C. 1938).

Accordingly, pronouncements of decisions of *state* courts as to the necessity of a *state* legislature determining its local policy are wholly inapplicable to the District of Columbia.

Nor is *Weinberg v. Safe Deposit & Trust Co.*, 198 Md. 539, 549, 85 A. 2d 50, 54 (1951), authority for the broad and unlimited proposition for which (Br. 22) it is cited. *Weinberg* involved an election against the will in the situation where the then existing Maryland Apportionment Act, *antedating* the marital deduction provision, specifically provided that a spouse who renounces the will shall not benefit by the apportionment statute. This provision, said the Maryland Court, "is a general direction which clearly indicates the intention of the Legislature that the

estate tax shall be deducted before the widow gets her share." The statute expressly directing against apportionment on the facts involved, of course, could not be disregarded by the court. It is significant, however, (Taxpayer's Br., Appendix C, p. 21) that the Maryland Legislature subsequently provided for full exoneration of property passing to a surviving spouse to the extent that it qualifies for the marital deduction.

In this connection, the Government, in response to the contention that adoption of an apportionment rule "will further accomplish the desirable end of avoiding conflict in marital property rights with the neighboring States of Virginia and Maryland," asserts that such "is totally devoid of any merit" (Br. 24) since the "indisputable fact" is that those States "have obtained an apportionment rule for federal estate taxes only after many tortuous sessions in successive legislatures." While the latter is an "indisputable fact," the fact is *also* indisputable that in both States the share of the surviving spouse otherwise qualifying for the marital deduction, whether in the case of testacy or intestacy, is exonerated from the federal estate tax burden.

The Government also suggests (Br. 25) that the recommendation made in 1958 by the National Conference on Commissioners on Uniform State Laws that a Uniform Estate Apportionment Act be adopted by all the states is without significance and that only one state, North Dakota, up to 1967 has adopted that provision. This is not true. Of the ten states adopting apportionment legislation subsequent to 1958, four (New Hampshire, Oklahoma, Wyoming and North Dakota), not one, have adopted such provisions.

In final answer to this point, the Government asserts (Br. 25) that Congress "has steadfastly refused to adopt any statute for the District of Columbia which would apportion federal estate taxes in the same manner as have

the Maryland and Virginia statutes." This is without support in the record. To the knowledge of counsel for Taxpayer, there has never been presented to the Congress any proposed legislation dealing with the apportionment of the federal estate tax in the District of Columbia.

E. Here the Government (Br. 26-43) Relies Upon Amendments Made to the District of Columbia Descent and Distribution Statutes in 1957 and, in Particular, in 1961 as Evidencing "the Intention of Congress," in the Cases of Intestacy, That for Purposes of Computing the Estate Tax Liability of the Estate of the Decedent, the Share of the Surviving Spouse, Otherwise Qualifying for the Marital Deduction, Must Be Burdened With a Portion of the Federal Estate Tax.

Since the Government appears to rely primarily on the amendments made to the statutes "on September 14, 1961," it is evident that the Government concedes that *prior* to such amendments such was *not* the intention of the Congress from 1948 forward. The thrust of the Government's argument, therefore, may be summarized as follows:

(1) By the amendment to section 18-101 made in 1957 (*i.e.*, with the abolishment of common law dower), granting to the surviving spouse of an intestate decedent a share in his real estate, the statutory term "surplus" thereafter included both the real and personal property (Br. 27);

(2) That by the 1961 amendment to section 18-101 "expressly" (Br. 35) providing for the payment of debts, administration expenses and taxes out of the decedent's real property if there was a deficiency of personal property, the statutory term "surplus" was then changed to mean an amount determined after estate tax (Br. 34, 41); and

(3) That by the 1961 amendment adding subsection (e) to section 18-211 thereby limiting a spouse electing against the will to "one-half of the net estate bequeathed and devised by said will," it was the inten-

tion of Congress to limit such spouse to "one-half of the surplus of decedent's probate assets." (Br. 31)

Thereafter, overlooking the fact that said subsection (e) has application *only* to "limit," in the case of *testate* estates, the Government concludes (Br. 43):

"Hence it is respectfully submitted that the Congress in its *characterization* in Section 18-211(e) * * *, of the distributable portion of an *intestate's* probate estate as his 'net estate' intended that such distributable portion includes only the balance or *surplus* of the *intestate's* estate remaining after deduction therefrom * * * federal and District of Columbia estate taxes." (Italics supplied.)

In support of this asserted Congressional "intention," the Government relies upon certain local decisions dealing with the payment of "debts of the decedent" in arriving at the "surplus" or "net estate" and to certain state court decisions dealing with the same as well as with the payment of federal estate tax.

The Taxpayer submits that each of the foregoing conclusions is completely unfounded, from which it follows that the asserted intention of Congress is nonexistent.

As to (1) above, the Government states (Br. 27) it to be "incontrovertible" that as a result of the 1957 amendment to section 18-101 the term "surplus" in section 18-701 *et seq.* of the Code *then* applied not only to the decedent's personal estate but also to his real estate. The Government bases this conclusion upon quoted statements from H. Rept. No. 304 (Br. 27, first full paragraph) that either surviving spouse:

" * * * 'can take her or his full statutory share of the real or personal property of the deceased spouse' as provided in sections 18-701, 18-702, 18-703, and 18-704 of the District of Columbia Code (1951 ed.)." (Italics supplied.)

To the extent that the Government attempts to attribute the italicized language to H. Rept. No. 304, its statement is erroneous. To correct that statement, therefore, there must be inserted before the expression "18-701" in such italicized language the expression "18-101" which latter provision deals with the descent of real property. So corrected, the Government's "incontrovertible" assertion becomes disputatious.*

That by this amendment the previous meaning of the term "surplus" was *not* changed is obvious from the language of the statute itself. It is first to be noted, therefore, that under section 18-701 (the "surplus" provision), the statute deals with property to be "distributed" not to property which "descends." Accordingly, it deals only with personal property. Further, under section 18-101, dealing with the "course of descents generally," it is provided that the real estate of an intestate "shall descend" to those persons *who would take* "the surplus personal property" of the decedent. The statute, therefore, obviously distinguishes between real property and personal property and does not include the former in the "surplus" of the latter. This is made even more clear by the revision of the language of that section by the 1965 amendments referred to by the Government (Br. 29), since current section 19-301(a) reads substantially as follows:

"The real estate * * * if not devised, shall *descend* in fee simple, and the *surplus* of the *personal estate*, if not bequeathed, shall be *distributed* * * *. The heirs specified by this subsection shall take the real estate as tenants in common *in the same proportions as they take the surplus personal estate* * * *." (Italics supplied.)

It is submitted that *if* the 1957 amendment referred to is of any significance, the foregoing clearly establishes that

* "Section 18-101 [as thus amended] does *not* combine the realty with personalty in hodge podge fashion. * * * It merely provides for distribution of the realty (not the surplus of the realty)." Whalen & Graham, *Recent Changes in Decedents' Estates Law of the District of Columbia*, 24 Jnl. D.C. Bar Assn. 610, 616-617 (1957).

the real estate of an intestate decedent is *not* a part of the "surplus personal property," distribution of which is otherwise provided for in the statute.

As to (2) above, the Congress in 1961 further amended section 18-101 to insert the provision that:

" * * * Subject to right of dower, such real property shall be liable in the event of insufficiency of the personal property [available] for the payment of the intestate's funeral expenses, debts, costs of administration and estate, inheritance and succession taxes in the same manner and to the same extent as the personal property of such intestate."

The Government apparently conceives that by this amendment the Congress *changed* the local law as to subject the real estate of the decedent to the payment of debts, administration expenses and federal and District estate taxes, with the intended result that contrary to the 1948 marital deduction legislation, the share of the surviving spouse in the decedent's assets must bear an appropriate portion of the federal estate tax.

It has *always* been the law in the District of Columbia, however, that in the absence of sufficient personal property available therefor, all real estate could be resorted to for the payment of *debts* (sections 18-601, 18-607, 18-609 and 18-610) as well as *administration expenses* (*Pascucci et al. v. Hart*, 160 F. 2d 255, 256 (C.A. D.C. 1947)) and *estate taxes*. *Bigoness v. Anderson*, 106 F. Supp. 986 (D.C. D.C. 1952). This being the law only by inference from the cited sections, the Congress in 1961 amended section 18-101 to "expressly" provide this result. Thus, by the amendment, the Congress did no more than to state specifically that which was the general statutory and decisional law previously existing. Congress did *not* say that the share of the surviving spouse *must* bear a burden of any federal estate tax. The 1961 amendment referred to doing no more, in this respect, than to specifically restate

the existing law, no intention is to be attributed to the Congress to thereby affirmatively require that in determining the share of a surviving spouse, otherwise qualifying for the marital deduction, such must be burdened with any portion of the federal estate tax.

As to (3) above, dealing with the election against the will by the surviving spouse, the Congress, in 1961, expressly *limited* the share which he or she might thereby take in the *testate* estate:

“ * * * to [no] more than one-half of the net estate *bequeathed and devised by said will*. * * * ” (Italics supplied.)

It is by this provision that the Government (Br. 31, 41) asserts that the Congress has “characterized” the distributable portion “of an *intestate*’s probate estate as his ‘net estate.’ ” It concludes that to determine the “net estate” referred to, taxes must first be set off.

Taxpayer submits that the attempt to “characterize” the surviving spouse’s share as “a distributable portion of the net estate” of an *intestate* is without support as is evidenced by the language of the statutory provision itself and the purpose of its enactment.

In the first place, subsection (e) of section 18-211 does not “characterize”; it merely “limits” a surviving spouse electing against the will of a *testate* decedent to no more than “one-half of the net estate *bequeathed and devised by said will*.” In H. Rept. No. 679, 87th Cong., 1st Sess., p. 4, the Committee on the District of Columbia stated that “there has been substantial criticism of the present law in that, on renunciation, the surviving spouse can, in the circumstances of no relatives closer than nephews and nieces, take the entire estate of the deceased spouse and thus wholly defeat the testator’s intentions.” Accordingly, it merely provided “a limitation on the share the

surviving spouse filing a renunciation can receive *in derogation of the will.*" (Italics supplied.) Contrary to the assertion of the Government, the term "net estate bequeathed and devised by said will" means neither the "net probate estate" nor the "net estate." Thus, if H dies testate as to \$100,000 but intestate as to \$200,000—leaving a surviving spouse but no other relatives closer than nephews and nieces—and the surviving spouse elects against the will—she is entitled to *all* of the intestate assets, whether realty or personalty (sections 18-101 and 18-702, District of Columbia Code (1961 ed.)) and, *in addition*, under section 18-211(e), to one-half "of the net estate bequeathed and devised by said will." See 1 Mersch, *Probate Court Practice in the District of Columbia* (2nd ed.) (1966 Pocket Part) at pp. 54-55.

On the basis of the foregoing, it is submitted that the Government errs (Br. 43) in asserting that the Congress "in its characterization in Section 18-211(e) * * *, of the distributable portion of an intestate's probate estate as his 'net estate' intended that such distributable portion includes" only the surplus of the intestate's estate after deducting therefrom federal and District of Columbia estate taxes. Predicated upon the foregoing, it is respectfully submitted that the Congress neither in 1957 nor in 1961 intended to affirmatively provide that the share of a surviving spouse of a District of Columbia intestate, otherwise qualifying for the marital deduction, should be burdened with any portion of the federal estate tax—for which reason the intention of local state legislatures, relied upon in the decisions cited by the Government, are of no consequence.

F. 1. The Government Asserts (Br. 43-44) to be "Devoid of Any Merit" the Taxpayer's Contention That the Congress, in Enacting the Marital Deduction Provisions in 1948, "Implicitly Expected" the District of Columbia Courts to Adopt a Rule of Apportionment Exonerating the Share of the Surviving Spouse From the Estate Tax.

Continuing in its effort to argue this proceeding as if it were one involving a *state* problem, the Government (1) notes that there is no "specific provision of section 2056" of the Code evidencing any intent to modify the application of the descent and distribution statutes of a *state* (Br. 43-44), (2) asserts that the Senate Report accompanying the bill discloses "that the *state* statutes of descent and distribution should in nowise be modified" (Br. 44), and (3) points to *state* court decisions (Br. 44-46) that by the marital deduction provision the Congress did not in anywise intend that *state* courts be required to modify the application of *their* respective local descent and distribution statutes. With this the Taxpayer can have no argument. Whether Congress is possessed of power, with respect to the state descent and distribution statutes, to provide where the burden of the federal estate tax shall fall (see discussion in *Wachovia Bank & Trust Co. v. Green* (Br. 44)) is immaterial since, *as to the states*, it is clear that Congress intended to leave to *them* the question of what portion of a decedent's estate should bear the burden of the tax.

Contrasted to the Government's position herein, however, we are *not* dealing with a *state* problem. We are dealing with one under the law of the District of Columbia where the intention of Congress as to what that law shall be is of exclusive significance. The Congressional purpose was to permit a transfer of up to one-half of non-community property to a surviving spouse "free of the estate tax." While *as to the states*, such was a "permissive" grant depending upon their local law; it is clear that in the District of Columbia the Congress intended to *require* that result in case of intestacy.

F. 2. Here the Government Asserts (Br. 46-48) That Section 2056(b)(4) of the 1954 Code Disclaims Any Intention on the Part of Congress That the One-Third of the Surplus of Decedent's Assets Which the Surviving Spouse Is Entitled To Receive Under the District of Columbia Code Should Escape Any Impact of Any Federal Estate Tax.

In support of this proposition, the Government cites *Campbell v. Lloyd*, 162 Ohio St. 203, 206, 122 N.E. 695, 697 (1954) for the proposition that by this provision "Congress *disclaimed* any intent that the marital deduction should *not* be burdened by the estate tax." For the same proposition, other *state* court decisions are cited.

Taxpayer admits the substance of this position in any situation *outside* the District of Columbia. In its attempt to achieve national uniformity in impact of the federal estate tax, the Congress, dealing with the testator before his death, said to him: "If in your will you leave to your surviving spouse up to 50% of your adjusted gross estate and specifically provide that such is not to be burdened by the federal estate tax, we will permit you to pass to such surviving spouse such one-half free of any estate tax so as to put you on a parity with your counterpart in a community property state." Where no estate tax provision was made in the will or where the decedent died intestate, the Congress said to the states: "If you, by legislation or judicial decision, see fit not to burden the share of the surviving spouse (to the extent it does not exceed 50% of the adjusted gross estate) with any part of the federal estate tax, we will place your decedent in the *same* favorable estate tax position as his counterpart in a community property state."

By section 2056(b)(4), Congress *merely recognized* that in the common law *states* the quantum of property passing to the surviving spouse necessarily depended on whether, under *state* law, such share was burdened with a portion of the tax *and provided* that *if it were* so burdened, the amount of the marital deduction should be appropriately

reduced. Thus, while Congress thereby disclaimed any intention that the amount of the marital deduction must *not* be burdened by the estate tax, it also did not say that it *should* be so burdened. Further, it is reasonable to assume that Congress expected each common law jurisdiction to exonerate the marital deduction portion from any tax burden in order that the estates of its local decedents could be placed upon an estate tax parity with community property states. In light of the unquestioned Congressional purpose to provide estate tax equality between common law and community property states, it is inconceivable that with respect to the District of Columbia, Congress intended a result contrary to its attempted and intended full and complete tax equalization. To hold otherwise is to attribute to the Congress a desire for inequality among taxpayers contrary to the principle enunciated in *Colgate-Palmolive-Peet v. United States*, 320 U.S. 422, 425 (1943).

F. 3. The Government Asserts (Br. 48) as "Devoid of Merit" and Contrary to the "Ratio Decidendi" of the Supreme Court in *Y.M.C.A. v. Davis* Its Statement of the Alleged Position of the Taxpayer, to Wit, that Congress, With the Enactment of the Marital Deduction Provision, "Expressly Provided" That the Surviving Spouse Should Take Her Statutory Share Free of Any Estate Tax "Merely Because" Her Distributable Share Under "State Statute" Qualifies for the Marital Deduction.

It is again evident that the Government would argue its case as though a law of a *state* were involved rather than the law of the District of Columbia.

Taxpayer's position *properly stated* is that although the Congress, in enacting the marital deduction provision, left to each of the several states the question of whether, in application, each would *permit* the full benefit intended, also clearly and unmistakably intended, for the District of Columbia—for which it also legislates locally—that such share *would* pass free of any such tax.

So viewed, Taxpayer's contention in no way contravenes the rationale of the Supreme Court in *Y.M.C.A. v. Davis*. The basis of the Court's decision there was that since local law was controlling as to whether a charitable bequest should bear a share of the federal estate tax burden—Congress not having otherwise provided—the local law, as enunciated by the Supreme Court of the State of Ohio, was controlling. As to the marital deduction allowance—the Congress not having otherwise provided *for any state*—the Ohio law is likewise controlling. As to the District of Columbia, however, it is the will of Congress which must be respected and applied rather than the will of any one of the several states. Since it was the unmistakable purpose of the Congress in enacting the marital deduction provision to provide, subject *only* to the right of the several *states* to defeat that purpose—that one-half of the property of a decedent could pass to the surviving spouse free of tax in the common law jurisdictions—it did not leave to the District of Columbia courts any right to provide otherwise.

G. In This Section of Its Brief, the Government Asserts (Br. 52) That the Decision of the Local District Court in *In re Estate of Collins*, 269 F. Supp. 633 (1967) Is Erroneous "and Should Not Be Followed."

Collins involved the estate of an intestate. In holding that the share of the surviving spouse therein *should* be exonerated from any federal estate tax burden, the Court (pp. 633-634) stated as follows:

"It is agreed that the ultimate impact of the tax is to be determined by local law. There is no express provision of the District of Columbia Code directing how the Federal Estate tax is to be charged. * * *

"In resolving this question, absent specific local law, the court is of the opinion that controlling consideration should be given to effectuating the intention of Congress in enacting the section of the Internal Revenue Code which allows a marital deduction."

In support of its position that *Collins* should not be followed, the Government asserts the following:

(1) That in *Collins* no consideration was given to section 19-301, District of Columbia Code (1961 ed., Supp. V), which it, the Government, asserts provides "that before arriving at the surplus personal estate of the intestate, estate taxes shall be deducted" (Br. 53);

(2) That the full impact of *Herson v. Mills* was not presented to the Court (Br. 53);

(3) That the quotation in *Collins* from *Northeastern Pennsylvania National Bank & Trust Company v. United States* "does not support the contention of Taxpayer that the Congress had enacted the marital deduction provisions for the benefit of the surviving spouse" (Br. 54) and that the intent imputed to the Congress in *Collins* "by its quotation from *Pitts v. Hamrick* * * * is unsupportable" (Br. 55); and

(4) That Congress, in its role as the legislative body for the District of Columbia, has made no attempt with respect to the District of Columbia "to create the 'equalization' " which "the marital deduction *had made possible* for the District."

As to (1) and (2) above, it is true that in the *Collins* decision no reference is made to section 19-301, *supra*, or to *Herson v. Mills*. This, however, does not mean that the Court's attention was not directed thereto and the same argument there made as is here made by the Government. In the "Memorandum in Opposition to Administrator's Petition for Instructions" in that case, the following is set forth:

"The District of Columbia statute of descent and distribution and relevant case law would refute the administrator's position. Title 19-301 of the District of Columbia Code provides, *inter alia*:

* * *

"The above statute refers to the distribution of the 'surplus' of the personal estate of the decedent * * * [which is *after tax*]."

Also following this is a lengthy discussion of *Herson v. Mills* as well as decisions of state courts, also cited herein by the Government, holding that in the absence of *state* legislation, the share of the surviving spouse must bear a part of the tax burden.

As to (3) above, the Government asserts that the purpose of Congress was merely "to equalize the incidence of the estate tax" but not, in connection therewith, "to maximize the quantum" of the assets receivable by a surviving spouse under *state* law (Br. 54).

Keeping in mind that we are dealing *not* with a *state* but with the District of Columbia, the Government in no way points out how "equalization of the incidence of the estate tax" or the Congressional purpose to allow transfer of up to one-half of noncommunity property to the surviving spouse *free of the estate tax* is to be effected *without* maximizing the quantum of the share of the surviving spouse in the District of Columbia. Since, under *North-eastern Pennsylvania National Bank & Trust Company v. United States, supra*, resolution of the question of whether the surviving spouse of a District of Columbia decedent is to be burdened with a portion of the federal estate tax is either "essentially" or "exclusively" a matter of "discovering the intent of Congress"—and that intent being clear—it can be effected *only* by maximization of the wife's share as herein contended for.

As to (4) above, the Government, continuing its attempt to equate the problem here presented with a "state" problem, asserts (Br. 59) "that Congress intended that the *state* law should determine the ultimate thrust of the tax." It continues with the semantological assertion that "the Congress, in its role as the legislative body for the

District of Columbia, has made no attempt to provide the equalization which * * * [it by] the marital deduction *had made possible* for the District."

The Government neither can nor does deny the intent of Congress in enacting the marital deduction provision as being to *establish* (other than as might result from application of local *state* law) a national system of federal estate taxation which would create uniformity in the estate tax impact between common law and community property jurisdictions. It reasons, however, that the Congressional intent was ineffective as to the District of Columbia because Congress failed to take some *further* and *necessary* local step to make such effective as to this jurisdiction.*

In support of this position, the Government *again* cites various *state* decisions, the effect (Br. 44) of which is that the "federal tax statute as amended which makes provision for marital deduction does not have the effect of controlling the *state* statutes as to the administration of decedent's estate" and that "power in this respect has not been granted to the Federal Government, and the right of *state* control is reserved (10th Amendment)" as stated in *Wachovia Bank & Trust Co. v. Green*. In this position, the Government, equating *this* action with one involving an intestate domiciled in one of the several *states*, overlooks the fact that it is Congress itself which legislates for this jurisdiction.

Thus, as stated by the Court in *Collins*, "controlling consideration" should be given to effectuating the intention of Congress in enacting the section of the Internal Revenue Code which allows the marital deduction. Any other result for the *District of Columbia* is to relegate estates of

* The position of the Government may be characterized, by paraphrasing what Lord Mildew said in *Bluff v. Father Gray* (Herbert, Uncommon Law, 192), that "If Congress, as to the District of Columbia, means what it says, it must say so."

local decedents to a position inferior to that *made possible* for each other common law jurisdiction and to assert that the unmistakable Congressional intention is impossible of being effectuated in the District without further and additional Congressional legislation.

SUMMATION

The issue involved herein, *i.e.*, whether the share of a surviving spouse of a District of Columbia decedent, otherwise qualifying for the marital deduction, is to be burdened by any portion of the federal estate tax liability resolves itself into the corollary issue as to whether, in the District of Columbia, the purpose and intent of Congress to allow transfers to the surviving spouse "free of the estate tax" is to be fully or only partially effected. It is to be noted that without the marital deduction, the federal estate tax herein (JA 23) would amount to \$2,932,752.83; that with the marital deduction claimed by Taxpayer (*i.e.*, the spouse's share bearing no part of the tax burden), the tax would be reduced to \$1,921,418.17 (thus providing for *full* equalization); and that under the Government's theory that the wife must bear a part of the tax burden, the reduction would be only to \$2,354,321.60 (the result being to only *partially* effect the Congressional intent).

Resolution of the question here presented being a matter of discovering the intent of Congress, Taxpayer submits that its solution may be effected by answering the following questions as to the Congressional intent *with respect to District of Columbia decedents*, in absence of a testamentary direction to the contrary:

- (1) Did Congress intend in 1948 to provide for full equalization of the estate tax burden with community property jurisdictions by allowing up to one-half of the decedent's gross estate to pass to the surviving spouse tax free?

(2) If so, did Congress, by failure to adopt for the District an appropriate tax apportionment statute, intend that its purpose be defeated?

(3) Having achieved its intended purpose in 1948, was it the intent of Congress to destroy the provided equalization through amendments made in 1957 and/or 1961 to the District of Columbia Code?

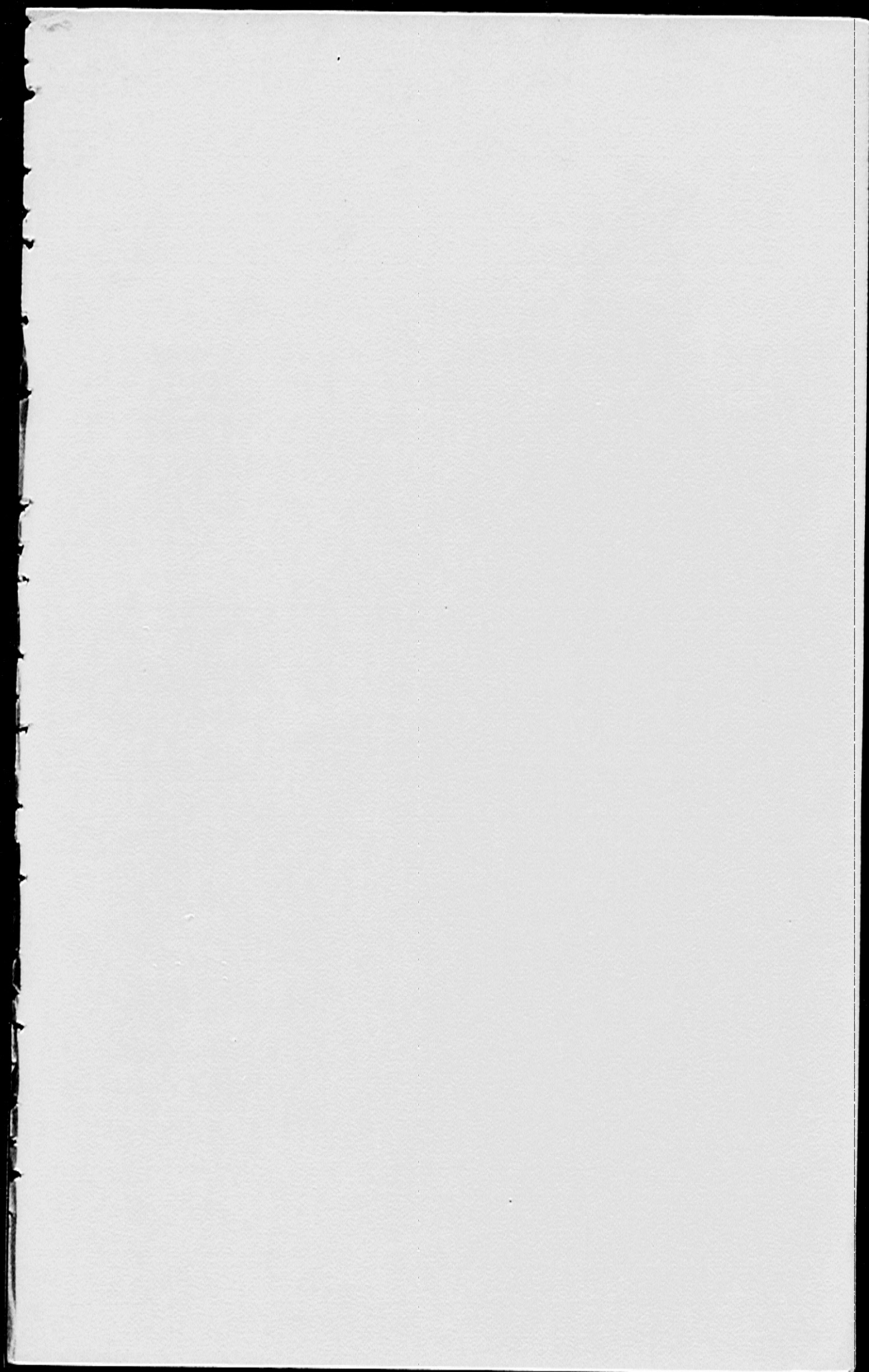
Respectfully submitted,

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Washington, D. C. 20006



JOINT APPENDIX

156

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR and THE RIGGS NATIONAL BANK OF
WASHINGTON, D. C., as Executors of the Estate of
CHARLES DELMAR, Deceased, *Appellants*,

v.

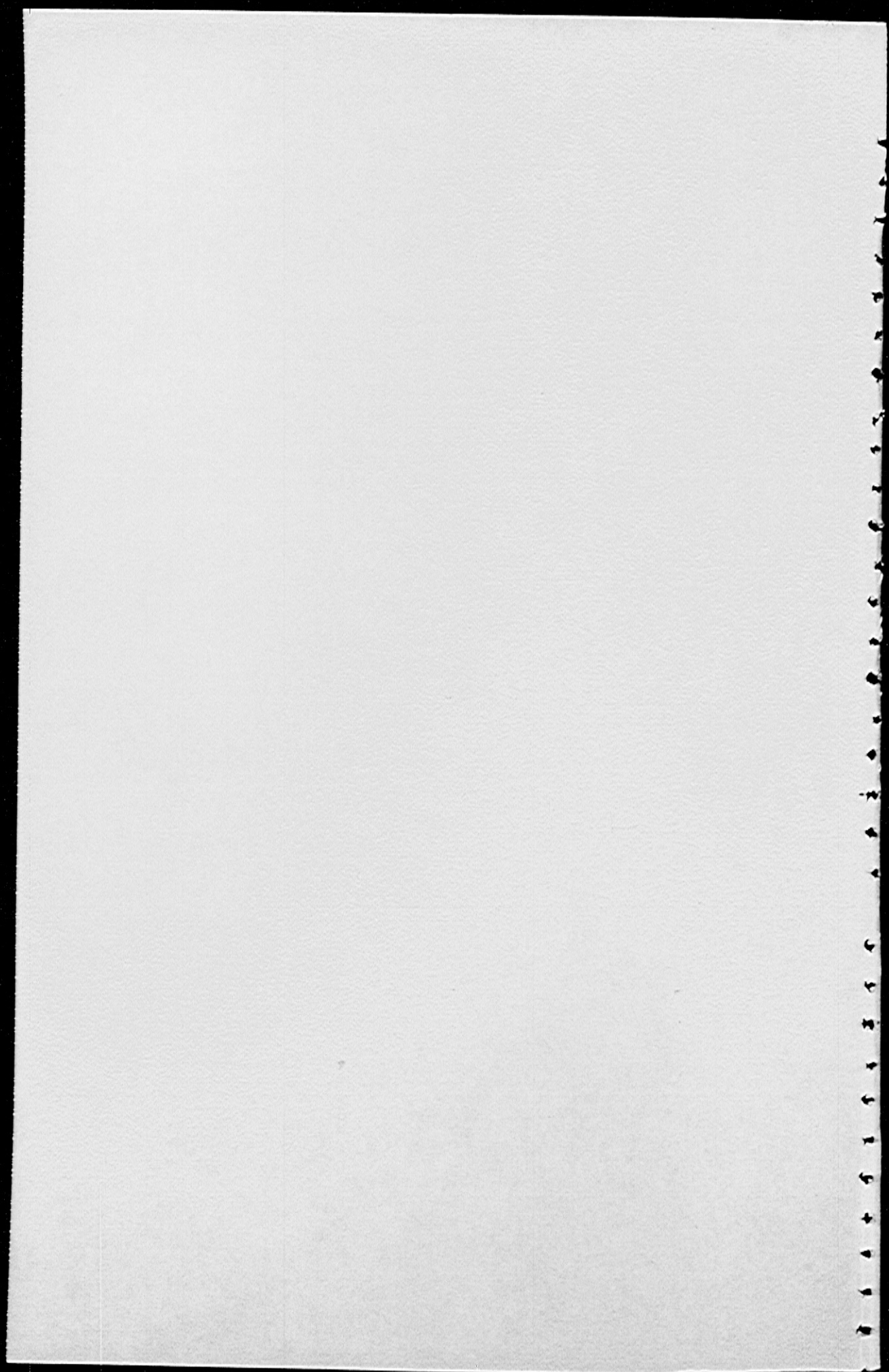
UNITED STATES OF AMERICA, *Appellee*.

On Appeal From Order and Judgment of the United States
District Court

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 11 1967

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR and THE RIGGS NATIONAL BANK OF
WASHINGTON, D. C., as Executors of the Estate of
CHARLES DELMAR, Deceased, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From Order and Judgment of the United States
District Court

JOINT APPENDIX

Civil Docket

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1966

- Oct. 3 Complaint, appearance. filed
- Oct. 3 Summons, copies (2) and copies (2) of Complaint issued
- Dec. 6 Motion of plaintiffs for summary judgment; statement; exhibit A with exhibits 1 thru 7; exhibit B with exhibits 1 and 2; memorandum, ser. ack. 12/6/66; M.C. 12/6/66. filed
- Dec. 7 Summons, copies (2) and copies (2) of complaint issued. Deft. ser. 12-8-66 Atty. Gen. ser. 12-19-66

1967

- Jan. 11 Stipulation of counsel extending time for deft. to respond to motion for summary judgment to and including 2-15-67. filed
- Feb. 8 Cross-motion of deft. to dismiss for lack of jurisdiction; memorandum; P&A; c/m 2-2; M.C. 2-8. filed
- Feb. 9 Withdrawal of deft.'s cross-motion to dismiss per counsel. filed
- Feb. 16 Opposition of deft. to plttf.'s motion for summary judgment; cross-motion for summary judgment; statement; P&A; c/m 2-15; appearance of Mitchell Rogovin, Stanley F. Krysa and Joseph H. Thibodeau. filed
- Feb. 20 Opposition of plttf. to cross-motion of deft.; c/m 2-20. filed
- Feb. 20 Answer of deft. to complaint; c/m 2-16; appearance of Mitchell Rogovin, Myron C. Baum and Joseph H. Thibodeau. filed
- Feb. 20 Calendared (N) AC/N. _____

- Mar. 7 Order denying and overruling plttfs.' motion for summary judgment; granting deft.'s motion for summary judgment and dismissing action with prejudice. (N) Matthews, J.
- Mar. 9 Transcript of proceedings 3-1-67. (Rep.: J. Blair—Court's copy) filed
- Mar. 20 Transcript of proceedings 3-3-67; Part I. (Rep.: J. Blair—Court's copy) filed
- May 2 Notice of appeal by plttfs. from order of 3-7-67; copy mailed to Joseph H. Thibodeau. Deposit by Brown \$5.00 filed
- May 3 Order granting plttfs. leave to deposit \$250.00, with Clerk, by bank cashier's checks, in lieu to bond for costs on appeal. (N) Jones, J.
- May 4 Deposit of \$250.00 by plttfs. into the Court in lieu of appeal bond per order of 5-3-67.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action, File No. 2603—'66

Complaint

(For Refund of Federal Estate Tax)

ROLAND H. DEL MAR (address: The Harbour Square Apartments, Apt. No. S231, 500 N. Street, S. W., Washington, D. C.) and THE RIGGS NATIONAL BANK OF WASHINGTON, D. C. (address: 800 17th Street, N. W., Washington, D. C. 20013), as Executors of the ESTATE OF CHARLES DELMAR, Deceased, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

1. This is a suit of a civil nature arising under the laws of the United States, including the laws providing for Internal Revenue, and including particularly the provisions of Title 28, United States Code section 1346(a)(1), as amended (28 U.S.C.A. section 1346(a)(1)).

2. Plaintiffs, Roland H. del Mar and The Riggs National Bank of Washington, D. C., are executors of the Last Will and Testament of Charles Delmar, Deceased. The Riggs National Bank of Washington, D. C. is a banking corporation organized and existing under the Federal Banking Laws with full authority to act as executor of wills and in other trust capacities.

3. Charles Delmar died August 17, 1963, a resident of Washington, District of Columbia, leaving a Last Will and Testament which was duly admitted to probate in the United States District Court for the District of Columbia, holding a probate court, to which jurisdiction in that behalf belonged. On September 11, 1963, letters testamentary were duly issued out of that Court to Ellsworth C. Alvord and The Riggs National Bank of Washington, D. C., who duly qualified as executors of said Last Will and Testament. On January 20, 1964, letters testamentary were duly

issued out of that Court to Roland H. del Mar as substitute executor in the place and stead of Ellsworth C. Alvord, deceased, and Roland H. del Mar duly qualified as an executor of the said Last Will and Testament. Since January 20, 1964, Roland H. del Mar and The Riggs National Bank of Washington, D. C. have been and still are duly qualified and acting as such executors.

4. Within six months after the will of the decedent was admitted to probate and on November 1, 1963, the surviving spouse, Jacqueline Delmar, acting under Section 18-211, Title 18, of the District of Columbia Code (1961 edition), filed with the Probate Court a written renunciation renouncing all claims to any and all devises and bequests made to her under the will and electing to receive her legal share of the real and personal property of the estate. At the time of the decedent's death, he owned real estate located in the State of Maryland. The surviving spouse also renounced the decedent's will in the ancillary administration effected in that State for the distribution of said real estate.

5. The plaintiffs have a just claim against the defendant for the sum of \$355,942.82, or such greater sum as results from the decision of the Court herein, together with interest as provided by law, which said sum was paid by the said executors of the Estate of Charles Delmar, Deceased, to the defendant through the duly appointed, qualified and acting District Director of Internal Revenue for the District of Maryland, as hereinafter set forth.

6. Within the time allowed by law, to wit, on November 16, 1964, plaintiffs filed with the said District Director of Internal Revenue a final estate tax return covering the Federal estate taxes assessable against the Estate of Charles Delmar, having previously filed the preliminary return required by law, and, on that date, paid the estate tax liability shown on the final return in the amount of \$1,969,231.36.

7. In said Federal estate tax return filed, the amount of the marital deduction claimed (\$1,725,725.58) was determined on the theory that the widow's share, though less than one-half of the adjusted gross estate, was subject to and must be reduced by a part of the Federal and District of Columbia estate tax. On the same theory, the office of the said District Director of Internal Revenue, in making the adjustments hereinafter referred to in paragraph 9, fixed the amount of the allowable marital deduction at \$1,726,620.96.

8. On June 24, 1965, plaintiffs, by mail, duly filed with the said District Director of Internal Revenue a claim for refund dated June 24, 1965 on the basis that the amount otherwise constituting the allowable marital deduction under Title 26, United States Code section 2056, as amended (26 U.S.C.A. section 2056), should not be reduced by either of such taxes.

9. Thereafter, the examining agent, reviewing said final return, made adjustments increasing the reported value of certain assets and reducing certain deductions claimed for administration expenses, none of which are in controversy herein, refused to otherwise increase the amount of the allowable marital deduction, as claimed, and determined that a deficiency existed in the amount of \$7,015.29, together with statutory interest thereon from the final date on which said tax return was due amounting to \$701.53, and the aggregate amount of \$7,716.82 was paid to the said District Director of Internal Revenue on August 25, 1966 covering this requirement. Also by nonregistered letter dated February 4, 1966 the said District Director tentatively proposed for disallowance plaintiffs' claim for refund.

10. This Complaint is filed before the expiration of two (2) years from the date of mailing of the said tentative notice of disallowance.

11. Based upon the grounds set forth in said claim for refund and the facts therein reflected, all of which are incor-

porated herein by reference, plaintiffs overpaid the Federal estate tax due in the amount of \$355,942.82, or such greater sum as should result from an appropriate decision of this Court.

12. The repayment of the amount of the claimed refund has been demanded but no part of said sum has been credited, remitted, refunded or repaid in any manner to the plaintiffs; and the full amount thereof, together with interest thereon, remains due and owing from the defendant to the plaintiffs.

WHEREFORE, plaintiffs demand judgment against defendant in the principal amount of \$355,942.82, or such greater sum as results from the decision of the Court herein, together with interest thereon as provided by law, from the dates of payment thereof, and all costs of this proceeding.

/s/ HARRY L. BROWN
Harry L. Brown
Counsel for Plaintiffs
200 World Center Building
Washington, D. C. 20006

Of Counsel:

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200 World Center Building
Washington, D. C. 20006

BRACKLEY SHAW, Esquire
SHAW, PITTMAN, POTTS, TROWBRIDGE & MADDEN
910 17th Street, N. W.
Washington, D. C. 20006

District of Columbia) ss.

Roland H. del Mar, being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that he verily believes the facts stated in the Complaint to be true.

/s/ ROLAND H. DEL MAR
Roland H. del Mar

Subscribed and sworn to before me this 27th day of September, 1966.

/s/ FRANCES B. HALL
Notary Public

My Commission Expires Feb. 14, 1970

District of Columbia) ss.

Edwin B. Shaw, being first duly sworn, deposes and says: I am a Vice President of The Riggs National Bank of Washington, D. C., one of the plaintiffs in the above-entitled action; I make this affidavit in behalf of that corporation; I have read the foregoing Complaint and know the contents thereof, and I verily believe the facts stated in the Complaint to be true.

/s/ EDWIN B. SHAW
Edwin B. Shaw

Subscribed and sworn to before me this 20th day of September, 1966.

/s/ ELIZABETH S. WILLIAMSON
Notary Public

My Commission Expires Feb. 28, 1968

[HEADING OMITTED]

Answer

The defendant, the United States of America, by its attorney, David G. Bress, Esquire, United States Attorney for the District of Columbia, for its answer to the complaint herein alleges as follows:

1. Admits the allegations contained in paragraph 1.
2. Admits the allegations contained in paragraph 2.
3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3.
4. Admits the allegations contained in the first sentence of paragraph 4. Denies knowledge or information sufficient to form a belief as to the truth of all other allegations contained in paragraph 4.
5. Admits the allegations contained in paragraph 5, except denies that plaintiffs have any just claim against the defendant for any amount.
6. Admits the allegations contained in paragraph 6.
7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7, except alleges that the District Director's determination speaks for itself.
8. Admits the allegations contained in paragraph 8, except denies each and every allegation contained in plaintiff's claim for refund.
9. Admits the allegations contained in paragraph 9.
10. Admits the allegations contained in paragraph 10.
11. Denies the allegations contained in paragraph 11.
12. Admits the allegations contained in paragraph 12, except denies that any amount remains due and owing from defendant to the plaintiffs.

WHEREFORE, defendant prays that judgment be entered in its favor, dismissing plaintiffs' complaint, allowing defendant its costs and such other and further relief as this Court may deem just and proper.

MITCHELL ROGOVIN
Mitchell Rogovin
*Assistant United States
Attorney General*

MYRON C. BAUM
Myron C. Baum
*Chief, Refund Trial
Section No. 2*

JOSEPH H. THIBODEAU
Joseph H. Thibodeau
*Attorneys, Tax Division
Department of Justice
Washington, D. C. 20530
Attorneys for Defendant*

Of Counsel:

/s/ DAVID G. BRESS
David G. Bress
United States Attorney

[HEADING OMITTED]

Motion for Summary Judgment

Plaintiffs, as executors of the Estate of Charles Delmar, Deceased, by their attorney, hereby move the Court to enter summary judgment for the plaintiffs in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, determinative of the issue whether the surviving spouse of a District of Columbia decedent, having filed a written renunciation under Section 18-211,

Title 18, of the District of Columbia Code (1961), takes her statutory share of the estate free of any Federal or District of Columbia estate tax.

In support hereof, plaintiffs rely upon the pleadings herein, the affidavit hereto attached and marked Exhibit A, Exhibits 1, 2, 3, 4, 5, 6 and 7 attached thereto, and the affidavit hereto attached and marked Exhibit B, Exhibits 1 and 2 attached thereto, all of which show that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

Plaintiffs further request that the Court, in entering its Order pursuant to this Motion, state therein, pursuant to 28 U.S.C.A. section 1292(b), that the Order involves the controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order will materially advance the ultimate termination of the litigation.

Respectfully submitted,

/s/ HARRY L. BROWN
Harry L. Brown
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Of Counsel:

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Washington, D. C. 20006

[HEADING OMITTED]

**Defendant's Opposition to Plaintiffs' Motion for Summary
Judgment and Cross-Motion for Summary Judgment**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9 of the rules of this Court, the defendant, the United States of America, respectfully opposes plaintiffs' motion for summary judgment and submits that it should be denied for the reasons set forth in its memorandum of points and authorities filed herewith.

Defendant further moves the Court to grant summary judgment in its favor on the grounds that there is no dispute as to any material fact involved in this controversy, and that the defendant is entitled to judgment as a matter of law.

In support of its cross-motion for summary judgment, the defendant relies on its statement of material facts as to which there is no genuine issue and the memorandum of points and authorities in support of its motion, both of which are filed herewith.

MITCHELL ROGOVIN
Mitchell Rogovin
Assistant Attorney General

STANLEY F. KRYSA
Stanley F. Krysa
*Acting Chief, Refund Trial
Section No. 2*

JOSEPH H. THIBODEAU
Joseph H. Thibodeau
Attorney
Tax Division
Department of Justice
Washington, D. C. 20530
Attorneys for Defendant

Of Counsel:

.....
DAVID G. BRESS
United States Attorney

[HEADING OMITTED]

Order and Judgment

The Court, having carefully considered the respective motions for summary judgment filed on behalf of each of the parties hereto, together with the briefs, pleadings, and oral arguments of counsel relating thereto, being of the opinion that the plaintiffs' motion should be overruled and that the defendant's motion should be granted, it is accordingly

ORDERED, ADJUDGED and DECREED by the Court that the plaintiffs' motion for summary judgment be and the same is hereby overruled and denied.

It is further ORDERED, ADJUDGED and DECREED by the Court that the defendant's motion for summary judgment be and the same hereby is granted and that this action is hereby dismissed with prejudice.

DONE this 7th day of March, 1967.

.....
United States District Judge

[HEADING OMITTED]

Notice of Appeal

NOTICE is hereby given that Roland H. del Mar and The Riggs National Bank of Washington, D. C., as Executors of the Estate of Charles Delmar, Deceased, the Plaintiffs above named, hereby appeal to the United States Court of Appeals for the District of Columbia from the Order and Judgment denying Plaintiffs' Motion for Summary Judgment and granting Defendant's Motion for Summary

Judgment and dismissing the action with prejudice entered in this action on March 7, 1967.

Dated: May 2, 1967.

HARRY L. BROWN

Harry L. Brown

Attorney for Appellants

Roland H. del Mar and
The Riggs National Bank
of Washington, D. C.

[HEADING OMITTED]

**Plaintiffs' Statement of Material Facts as to Which There
Should Be No Genuine Issue**

This statement is made under Rule 9(h) of the Rules of this Court and in support of a Motion for Summary Judgment in a suit for the recovery of an asserted overpayment of Federal estate tax heretofore made to defendant by plaintiffs.

Charles Delmar died August 17, 1963 a resident of Washington, District of Columbia, leaving a Last Will and Testament and a First and Second Codicil thereto, all of which were duly admitted to probate in the United States District Court for the District of Columbia, holding a probate court, to which jurisdiction in that behalf belonged.

The date of death value, before death taxes, of the probate estate for distribution (plus real estate) amounted to \$7,627,073.30.

On September 11, 1963, letters testamentary were duly issued out of the said District Court to Ellsworth C. Alvord and The Riggs National Bank of Washington, D. C. who duly qualified as executors of said Last Will and Testament. On January 20, 1964, letters testamentary were duly issued out of that Court to Roland H. del Mar as substitute

executor in the place and stead of Ellsworth C. Alvord, Deceased, and Roland H. del Mar duly qualified as an executor of the said Last Will and Testament. Since January 20, 1964, Roland H. del Mar and The Riggs National Bank of Washington, D. C. have been and still are duly qualified and acting as such executors.

Under the terms of the Will of Charles Delmar, Deceased, there was bequeathed and devised to his surviving spouse, Jacqueline Delmar, the land and building constituting their home at the time of his death, together with the furniture and fixtures located therein. The Will further provided that there should be placed in trust for her exclusive benefit an amount which, when added to the foregoing, would be equal to one-third of the sum of (a) all personal property distributable by his executors under the Will and (b) all real property owned by him at the time of his death. Specific bequests aggregating the amount of \$38,750.00 were left to various named legatees; the sum of \$1,000,000 was left to The Charles Delmar Foundation, a recognized charitable organization; and the residue of the estate was left to Roland H. del Mar, son of the decedent.

Paragraph (14) of the Will provided that the executors should pay out of the "residuary estate," without right of reimbursement, all estate, inheritance and succession taxes.

Within six months after the Will of the decedent was admitted to probate, and on November 1, 1963, the surviving spouse, Jacqueline Delmar, acting under Section 18-211, Title 18, of the District of Columbia Code (1961 edition), filed with the said District Court a written renunciation renouncing all claims to any and all devises and bequests made to her under the Will and electing to receive her legal share of the real and personal property of the estate.

Within the time allowed by law, to wit, on November 16, 1964, plaintiffs filed with the District Director of Internal

Revenue for the District of Maryland a final estate tax return covering the Federal estate taxes assessable against the Estate of Charles Delmar, Deceased, having previously filed the preliminary return required by law, and, on that date, paid the estate tax liability shown on the final return in the amount of \$1,969,231.36.

In said Federal Estate Tax Return filed, the amount of the claimed marital deduction (\$1,725,725.58) under section 2056, Internal Revenue Code of 1954, was determined on the theory that the share of the surviving spouse, though less than one-half of the adjusted gross estate, was subject to and must be reduced by a part of the Federal and District of Columbia estate taxes. On the same theory, the Office of the District Director of Internal Revenue, on examination of the said return, though making other adjustments not here in controversy, fixed the amount of the allowable marital deduction at \$1,726,620.96.

On June 24, 1965, plaintiffs, by mail, duly filed with the said District Director of Internal Revenue a claim for refund dated June 24, 1965 on the basis that the amount otherwise constituting the allowable marital deduction should not be reduced by either the Federal or the District of Columbia estate tax. By nonregistered letter dated February 4, 1966, the said District Director tentatively proposed for disallowance plaintiffs' claim for refund.

Plaintiffs also filed on or about November 17, 1964 with the Finance Office, Revenue Division, Inheritance and Estate Tax Section, of the District of Columbia, a protective claim for refund of part of the District of Columbia estate tax which had been paid. Therein it requested that action on the claim be held in abeyance until such time as the merits of the Federal claim had been determined. This the Government of the District of Columbia agreed to do.

The Riggs National Bank of Washington, D. C., as executor of the Estate of Charles Delmar, Deceased, made the following payments of inheritance and estate taxes (and

interest) to the following jurisdictions on the following dates:

State of Maryland Inheritance Tax

Jacqueline Delmar	(12/12/64)	\$ 292.37
Roland H. del Mar	(12/12/64)	584.75
		<hr/>
		\$ 877.12

District of Columbia Inheritance Tax

Jacqueline Delmar	(11/12/64)	\$ 76,691.34
Roland H. del Mar	(11/12/64)	117,920.18
Other Legatees	(11/12/64)	425.00
		<hr/>
		\$195,036.52

District of Columbia Estate Tax

Original	(1/15/65)	\$ 180,644.49
Deficiency	(8/ 8/66)	1,516.81
		<hr/>
		\$ 182,161.30

Federal Estate Tax

Original	(11/16/64)	\$1,969,231.36
Deficiency	(8/22/66)	7,015.29
		<hr/>
Total Tax		\$1,976,246.65
Interest	(8/22/66)	701.53

Were there no marital deduction provided for in the Federal estate tax law, the surviving spouse, Jacqueline Delmar, would have been liable for a Maryland inheritance tax in the amount of \$292.37; for a District of Columbia inheritance tax in the amount of \$61,460.63; for a District of Columbia estate tax in the amount of \$145,751.16; and for a Federal estate tax in the amount of \$977,584.28—for a total of \$1,185,088.44. Under the terms of the Will, the residuary estate would have been liable for the balance of the Maryland and District of Columbia inheritance taxes and the District of Columbia and Federal estate taxes aggregating \$2,335,214.67.

Under the Government's theory on which the amount of the allowable marital deduction should be determined, the

surviving spouse, Jacqueline Delmar, is liable for a Maryland inheritance tax in the amount of \$292.37; for a District of Columbia inheritance tax in the amount of \$76,691.34; for a District of Columbia estate tax in the amount of \$60,720.43; and for a Federal estate tax in the amount of \$658,748.88—for a total of \$796,453.02. Under the terms of the Will, the residuary estate is liable for the balance of the Maryland and District of Columbia inheritance taxes and the District of Columbia and Federal estate taxes which would aggregate \$1,557,868.58.

Under plaintiffs' theory on which the amount of the allowable marital deduction should be determined, the surviving spouse, Jacqueline Delmar, would be liable for a Maryland inheritance tax in the amount of \$292.37; for a District of Columbia inheritance tax in the amount of \$109,081.58; and to no District of Columbia or Federal estate tax—for a total of \$109,373.95. Under the terms of the Will, the residuary estate would be liable for the balance of the Maryland and District of Columbia inheritance taxes and for all of the District of Columbia and Federal estate taxes aggregating \$1,812,044.22.

The claim for refund involved herein was timely filed.

Respectfully submitted,

/s/ HARRY L. BROWN

Harry L. Brown

Counsel for Plaintiffs

200 World Center Building

Washington, D. C. 20006

Of Counsel:

ALVORD AND ALVORD

200 World Center Building

Washington, D. C. 20006

BECKLEY SHAW, *Esquire*

SHAW, PITTMAN, POTTS, TROWBRIDGE & MADDEN

910 17th Street, N. W.

Washington, D. C. 20006

EXHIBIT B**Affidavit of Shirley T. Moore in Support of Plaintiffs' Motion
for Summary Judgment**

DISTRICT OF COLUMBIA SS.

Shirley T. Moore, being first duly sworn, deposes and states:

(1)(a) That I am a certified public accountant duly licensed under the laws of the State of Maryland and possessed of a certification under the laws of the District of Columbia, and have followed the accounting profession for approximately 16 years, presently maintaining offices at 918-16th Street, N. W., Washington, D. C. and 8801 Colesville Road, Silver Spring, Maryland.

(b) That this affidavit, based on personal knowledge, is submitted in support of the plaintiffs' Motion for Summary Judgment herein, for the purpose of showing, in addition to the allegations contained in the Complaint filed by the Executors of the Estate of Charles Delmar, Deceased, in Civil Action, File No. 2603-66, in the United States District Court for the District of Columbia, which may stand admitted, that there is in this action no genuine issue as to any material fact, and that the plaintiffs are entitled to judgment as a matter of law.

(2) That for years I have been active in the preparation of tax returns; that I was active in the preparation of the Federal Estate Tax Return for the Estate of Charles Delmar; and that I am familiar with that return as filed and with the adjustments made thereto both by the examining agent and a conferee of the Internal Revenue Service.

(3) That at the request of Harry L. Brown, Esq., counsel for the said Estate of Charles Delmar, Deceased, I have prepared Exhibits 1 and 2, attached hereto and made a part hereof.

(4) That Exhibit 1, with respect to the Estate of Charles Delmar, Deceased, sets forth, in a 3-column comparison, the Maryland inheritance tax, the District of Columbia inheritance and estate taxes, and the Federal estate tax which would result with respect to the gross taxable estate (as adjusted) if under the Federal Internal Revenue Code of 1954 (1) no marital deduction, otherwise provided for in section 2056, were allowable, (2) after giving effect to the marital deduction provided for in that section in the amount determined by the Internal Revenue Service as being proper, and (3) after giving effect to such marital deduction in an amount asserted to be proper in the Complaint filed in the foregoing action. There is also set forth in said Exhibit 1 a comparison of the death tax reduction arising from the allowance of a marital deduction which results from the Internal Revenue Service determination of the proper amount of that deduction and from the amount asserted in the said Complaint to represent the proper marital deduction.

(5) That in said Exhibit 1, the tax reduction to the wife (representing the excess of column (1) over column (3)) results solely from the imposition of no estate tax on her share of the estate; the resulting tax reduction for the son (the excess of column (1) over column (3)) arises only incidentally and from the fact that the resulting taxable estate is subjected to a lower progressive tax rate.

(6) That Exhibit 2 is a 3-column comparison, with respect to the said Estate of Charles Delmar, Deceased, of the after-tax distributable probate estate (1) were no marital deduction allowable for Federal estate tax purposes, (2) were the marital deduction computed by the Internal Revenue Service the properly allowable amount of that deduction, and (3) were the properly allowable

marital deduction in the amount asserted in the aforesaid Complaint.

FURTHER DEPONENT SAYETH NOT.

/s/ SHIRLEY T. MOORE
Shirley T. Moore

Subscribed and sworn to before me this 1st day of December, 1966.

My Commission Expires Feb. 14, 1970

/s/ FRANCES B. HALL
Notary Public

/s/ HARRY L. BROWN
Harry L. Brown
Counsel for Plaintiffs
200 World Center Building
Washington, D. C. 20006

ESTATE OF CHARLES DELMAR
Tax Liabilities and Their Distribution

	(1) No Marital Deduction	(2) Allowed Marital Deduction	(3) Claimed Marital Deduction
Gross Taxable Estate (as adjusted)	\$8,275,302.10		
Less:			
Administration expenses, etc.	\$ 669,440.51		
Charitable deduction	1,000,000.00		
Specific exemption	60,000.00	1,729,440.51	
Net Taxable Estate before Marital Deduction	\$6,545,861.59	\$6,545,861.59	\$6,545,861.59
(1) No Marital Deduction			
(2) Allowed Marital Deduction		1,726,620.96	
(3) Claimed Marital Deduction			2,413,769.26
Taxable Estate	\$6,545,861.59	\$4,819,240.63	\$4,132,092.33
Gross Federal Estate Tax	3,520,303.11	2,354,321.60	1,921,418.17
Less: Section 2011 Credit	587,550.28	378,074.95	301,114.34
Net Federal Estate Tax	2,932,752.83	1,976,246.65	1,620,303.83
Maryland Inheritance Tax:			
Wife	292.37	292.37	292.37
Son (Estate)	584.76	584.76	584.76
Total	877.13	877.13	877.13
D. C. Inheritance Tax:			
Wife	61,460.63	76,691.34	109,081.58
Son (Estate)	87,958.99	118,345.18	104,271.11
Total	149,419.62	195,036.52	213,352.69
D. C. Estate Tax:			
Wife	145,751.16	60,720.43	
Son (Estate)	291,502.37	121,440.87	86,884.52
Total	437,253.53	182,161.30	86,884.52
Total Maryland and D. C. Tax:			
Wife	207,504.16	137,704.14	109,373.95
Son (Estate)	380,046.12	240,370.81	191,740.39
Total	587,550.28	378,074.95	301,114.34
Federal Estate Tax:			
Wife	977,584.28	658,748.88	
Son (Estate)	1,955,168.55	1,317,497.77	1,620,303.83
Total	2,932,752.83	1,976,246.65	1,620,303.83
Federal, Maryland and D. C. Tax:			
Wife	1,185,088.44	796,453.02	109,373.95
Son (Estate)	2,335,214.67	1,557,868.58	1,812,044.22
Total	\$3,520,303.11	\$2,354,321.60	\$1,921,418.17
Tax Reduction:			
(2) over (1):			
Wife		388,635.42	
Son (Estate)		777,346.09	
Total		\$1,165,981.51	
(3) over (1):			
Wife			1,075,714.49
Son (Estate)			523,170.45
Total			\$1,598,884.94

ESTATE OF CHARLES DELMAR

Probate Estate for Distribution:

- (1) No Marital Deduction
 (2) Allowed Marital Deduction
 (3) Claimed Marital Deduction

Gross estate—Federal tax purposes		\$8,275,302.10
Add: Security value write-down for tax purposes under Section 2032 "alternate valuation"		57,643.65
Probate Valuation		\$8,332,945.75
Less:		
Administration expense, debts, etc.	\$ 669,440.51	
Non-probate assets	36,431.94	705,872.45
Probate estate before tax		\$7,627,073.30

DISTRIBUTION
UNDER

	(1) No Marital Deduction	(2) Allowed Marital Deduction	(3) Claimed Marital Deduction
Probate estate before tax	\$7,627,073.30	\$7,627,073.30	\$7,627,073.30
Less:			
Md. and D. C. tax	\$ 587,550.28	\$ 378,047.95	\$ 301,114.34
Federal estate tax	2,932,752.83	1,976,246.65	1,620,303.83
Balance	\$4,106,770.19	\$5,272,751.70	\$5,705,655.13
DISTRIBUTION:			
Named individual legatees	38,750.00	38,750.00	38,750.00
Charity	1,000,000.00	1,000,000.00	1,000,000.00
Wife:			
Gross	2,542,357.76	2,542,357.76	2,542,357.76
Less tax	1,185,088.44	796,453.02	109,373.95
Net	1,357,269.32	1,745,904.74	2,432,983.81
Son (Estate):			
Gross	4,045,965.54	4,045,965.54	4,045,965.54
Less tax	2,335,214.67	1,557,868.58	1,812,044.22
Net	1,710,750.87	2,488,096.96	2,233,921.32
Total distribution after tax	\$4,106,770.19	\$5,272,751.70	\$5,705,655.13
Increase in distribution			
(2) over (1)			
Wife		\$ 388,635.42	
Son (Estate)		777,346.09	
Total		\$1,165,981.51	
(3) over (1)			
Wife			\$1,075,714.49
Son (Estate)			523,170.45
Total			\$1,598,884.94

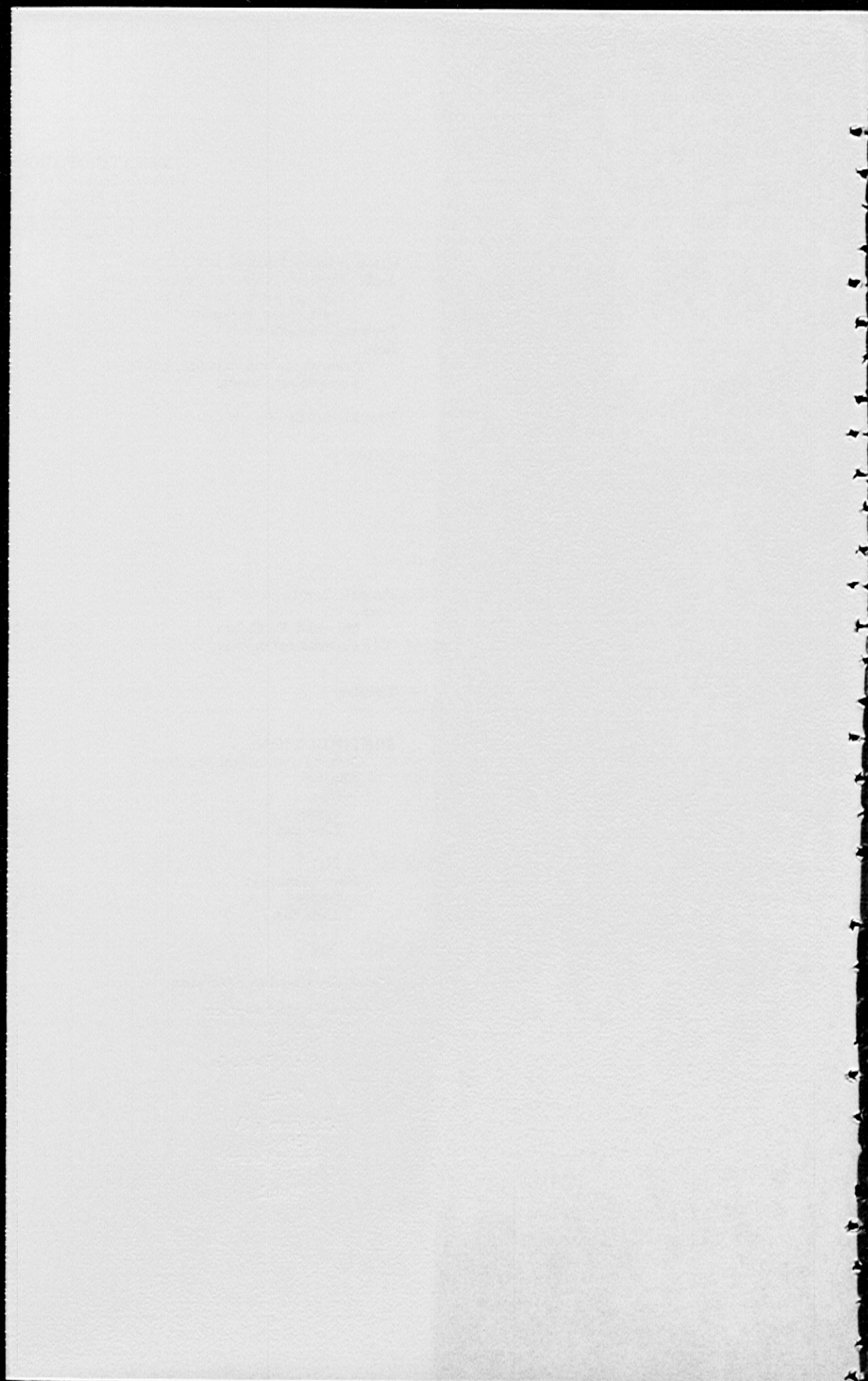


EXHIBIT A

[Heading Omitted]

**Affidavit of Edwin B. Shaw in Support of Plaintiffs' Motion
for Summary Judgment**

DISTRICT OF COLUMBIA) SS.

Edwin B. Shaw, being first duly sworn, deposes and states:

(1)(a) That I am a Vice President of The Riggs National Bank of Washington, D. C., one of the plaintiffs in Civil Action, File No. 2603-66, before the United States District Court for the District of Columbia.

(b) That this affidavit, based on personal knowledge, is submitted in support of the Plaintiffs' Motion for Summary Judgment herein, for the purpose of showing, in addition to the allegations contained in the Complaint which may stand admitted, that there is in this action no genuine issue as to any material fact, and that the plaintiffs are entitled to judgment as a matter of law.

* * *

(11) That as an Executor of the Estate of Charles Delmar, The Riggs National Bank of Washington, D. C. made the following payments of inheritance and estate taxes to the following Governments on the following dates and in the following amounts (including interest where so identified):

State of Maryland Inheritance Tax

Jacqueline Delmar	(12/12/64)	\$	292.37
Roland H. del Mar	(12/12/64)		584.75
			<hr/>
		\$	877.12

District of Columbia Inheritance Tax

Jacqueline Delmar	(11/12/64)	\$	76,691.34
Roland H. del Mar	(11/12/64)		117,920.18
Other Legatees	(11/12/64)		425.00
			<hr/>
		\$	195,036.52

District of Columbia Estate Tax

Original	(1/15/65)	\$ 180,644.49
Deficiency	(8/ 8/66)	1,516.81
		<hr/>
		\$ 182,161.30

Federal Estate Tax

Original	(11/16/64)	\$1,969,231.36
Deficiency	(8/22/66)	7,015.29
		<hr/>
Total Tax		\$1,976,246.65
Interest	(8/22/66)	701.53

* * *

[Heading Omitted]

**Defendant's Statement of Material Facts as to Which There Is
No Genuine Issue of Fact and Denial of Plaintiffs' State-
ment of Material Facts as to Which There Should Be No
Genuine Issue**

Pursuant to Rule 9(h) of the Rules of this Court, defendant herewith contests all facts contained in plaintiffs' statement of material facts, except those contained and alleged by defendant herein as being without any genuine issue. Defendant further contends that the facts stated herein as to which there is no genuine issue provide a sufficient basis upon which this Court may grant summary judgment in defendant's favor.

1. Plaintiffs seek recovery of taxes paid on the estate of Charles F. Delmar, who died a resident of Washington, District of Columbia, on August 17, 1963.

2. Plaintiffs are residents of Washington, District of Columbia.

3. Plaintiffs are the co-executors of the above-mentioned estate and, in such capacity, filed the Federal estate tax return on or about November 16, 1964, paying the tax shown thereon to be due.

4. Plaintiffs' Federal estate tax return claimed the amount of \$1,725,725.88 as a deduction under Section 2056

of the Internal Revenue Code of 1954, otherwise known as the "marital deduction".

5. Upon examination by the District Director of Internal Revenue, the amount of the marital deduction allowance was increased to \$1,727,174.73.

6. Pursuant to Section 18-211, Title 18, of the District of Columbia Code (1961 Edition), the decedent's surviving spouse, Jacqueline Delmar, renounced all claims to any and all devises and bequests made to her under the Will of Charles F. Delmar.

7. Decedent's said surviving spouse thereby received a statutory share of decedent's estate equivalent to that share which she would have received had decedent died intestate.

8. On June 24, 1965, plaintiffs filed with the District Director of Internal Revenue a Claim for Refund (Form 843), seeking the recovery of taxes paid on the estate of Charles F. Delmar.

9. Plaintiffs' complaint has been timely filed and requests relief on the same grounds as were presented in its claim for refund.

10. True and correct copies of the following documents are attached as Exhibit A to plaintiffs' Motion for Summary Judgment:

(a) The Last Will and Testament of Charles F. Delmar, with the first and second codicils thereto.

(b) The Federal Estate Tax Return (Form 706) for the estate of Charles F. Delmar.

(c) Documents computing, and notifying the plaintiffs of, the determination by the Internal Revenue Service of the Federal estate tax liability on the estate of Charles F. Delmar.

(d) Plaintiffs' Claim for Refund (Form 843).

(e) The Renunciation of Devises and Bequests in the estate of Charles F. Delmar, executed in November, 1963, by his surviving spouse, Jacqueline Delmar.

11. Defendant avers that each of the foregoing documents speaks for itself and that these documents, when taken in conjunction with the foregoing statements and the pleadings herein, afford sufficient basis upon which this Court may grant a Summary Judgment in its favor.

• • •

Last Will and Testament of Charles Delmar

(1) I, Charles Delmar, now residing at 3130 "P" Street, N. W., Washington, D. C., being of sound and disposing mind and memory, do hereby make, publish and declare this to be my last will and testament, and I do hereby revoke any and all other wills, codicils, or testaments by me at any time heretofore made.

(2) I direct my executors to pay all my just debts, funeral expenses, and expenses of administration as soon after my death as conveniently may be done. I authorize and direct my executors to pay whatever sum is necessary to provide me with such funeral as is considered appropriate by my wife, Jacqueline Delmar, without regard to any limitation placed thereon by law, and I further authorize and direct my executors to pay any reasonable sum for a burial lot and monument adequate for me, to be selected by my said wife.

(3) I give, bequeath, and devise to my wife, Jacqueline Delmar, her heirs and assigns, the land and buildings constituting our home in the District of Columbia at the time of my death, whether such home shall be at 3130 "P" Street, N. W. where it is now located or at any other address in the District of Columbia. I also give and bequeath to my said wife all of the furniture, fixtures, and

other tangible personal property located therein at the time of my death, except such part thereof as elsewhere in this will I have expressly bequeathed to my son, Roland Haddaway Delmar. The term "tangible personal property" used herein shall not be deemed to include any money, securities, bank accounts, or similar investment properties.

(4) I give and bequeath to my trustees so much of my personal property as, when increased by the real and personal property devised and bequeathed to my wife, Jacqueline Delmar, by Paragraph (3) hereof, may be equal to one-third of the sum of (a) all personal property distributable by my executors under this will, after the payment of all funeral expenses, expenses of administration of my estate, and debts of my estate (including all estate and inheritance taxes payable by my executors under Paragraph (14) hereof), and (b) all real property owned by me at the time of my death. For the purpose of the preceding sentence, real property shall be valued as of the date of my death, and personal property as of the date of distribution thereof by my executors. This bequest is payable in cash or in securities or partly in cash and partly in securities as my executors in their sole discretion shall determine, provided that any property or interests in property used, or the proceeds of which are used, for the payment of this bequest shall be such as may qualify for the marital deduction under the Federal estate tax laws. The amount so paid to my trustees shall be held by them in trust upon the following terms and conditions:

(i) To pay the entire net income thereof in quarterly or more frequent installments to my wife, Jacqueline Delmar.

(ii) This trust shall terminate—

(a) At the time my wife, Jacqueline Delmar, attains the age of fifty (50) years; or

(b) Such earlier date as my trustees shall in their sole discretion deem advisable.

(iii) Upon termination the entire principal shall be distributed to my said wife or to her estate free of the trust.

• • •

(14) My executors shall pay out of my residuary estate (without any right of reimbursement) all estate, inheritance, and succession taxes, and all other governmental charges which may be assessed against any gift made by me under this will, and which may be determined to be due against any property transferred by me in trust during my lifetime and against all property owned by me and any other person as tenants by the entirety or as joint tenants with right of survivorship and passing at the time of my death to such surviving tenants by reason of such ownership, and any such taxes or other governmental charges as shall be assessed against any insurance issued on my life payable to named beneficiaries, whether in a lump sum or in trust or permitted to remain in the hands of the insurance company on optional settlement. It is my intention that all property passing under this will, except that passing as my residuary estate, and all property transferred by me in trust during my lifetime, and all property passing at my death to a survivor by reasons of ownership as tenants by the entirety or joint tenants with right of survivorship, and the proceeds of all life insurance payable to a named beneficiary whether in a lump sum, in trust, or under an option of settlement, shall pass undiminished by any such taxes or other governmental charges.

• • •

IN WITNESS WHEREOF, I have hereunto set my hand and seal to this my Last Will and Testament, written on sixteen (16) sheets of paper, each sheet signed at the end thereof, this 12th day of December, 1957, in the presence of the undersigned.

• • •

First Codicil to Last Will and Testament of Charles Delmar

I, Charles Delmar, now residing at 3130 "P" Street N. W., Washington, D. C., declare this to be a First Codicil to my Last Will and Testament which I executed on December 12, 1957.

* * *

(2) I direct that the provisions appearing in my Will as subparagraphs (i), (ii) and (iii) of Paragraph (4) shall be stricken, and that in their place and stead the following shall be substituted:

"(i) The entire net income of this trust shall be paid in quarterly or more frequent installments to my wife, Jacqueline Delmar, throughout her lifetime.

"(ii) Upon her death, or at any time during her life but only after she has attained the age of fifty (50) years, the entire corpus of the trust, including any income which may not have been previously distributed, shall be paid over, free of this trust, to such person or persons (including my said wife, her estate, her creditors, or the creditors of her estate), in such portions, and upon such trusts, conditions, or limitations, as my said wife shall appoint."

(3) The interest of any beneficiary in principal or income of any trust under my Will shall not be subject to assignment, alienation, pledge, attachment, or to the claims of creditors of such beneficiary.

* * *

Second Codicil to Last Will and Testament of Charles Delmar

I, Charles Delmar, now residing at 3130 "P" Street, N. W., Washington, D. C., declare this to be a Second Codicil to my Last Will and Testament which I executed on December 12, 1957, and the First Codicil which I executed on October 31, 1958.

• • •

(3) Except as hereinbefore stated, I expressly confirm my said Last Will and Testament which I executed on December 12, 1957 and the First Codicil which I executed on October 31, 1958.

• • •

Estate Tax Return

GROSS ESTATE

SCHEDULE A

REAL ESTATE

Did the decedent, at the time of his death, own any real estate in the United States? ☒ Yes ☐ No

Item No.	Description	Subsequent valuation date	Alternate value	Value at date of death
1	Lot 829 in Square 1256, improved by premises 3130 "P" Street, N. W., Washington, D. C. (sold 7/17/64. Net Proceeds)	7/17/64	\$109,604.00	\$109,604.00
2	Tract of land with improvements known as "Oakland" containing approximately 80 acres. Tract of unimproved land containing approximately 40 acres. Both tracts located in Petersville Election District, Frederic County, Maryland. Appraisal Attached	8/17/64	79,300.00	79,300.00
3	Unimproved lots 18, 19, 20, 21, 22, 23, 24 and 25 in Block 26, Villa Site addition to Homosassa, Florida, Township 19 South Range 17 East. Recorded, Citrus County, Florida, Book 26, Page 18	8/17/64	600.00	600.00
TOTAL (also enter under the Recapitulation, Schedule O)			\$189,504.00	\$189,504.00

ESTATE OF CHARLES DELMAR

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SCHEDULE B

STOCKS AND BONDS

1. Did the decedent, if a resident or citizen of the United States, own any stocks or bonds, regardless of physical location at the time of his death? ☒ Yes ☐ No

2. Did the decedent, if a nonresident not a citizen of the United States, own, at the time of his death, any stocks of corporations organized in the United States or bonds situated in the United States as explained in the instructions? ☐ Yes ☐ No

Item No.	Description (including face amount of bonds or number of shares)	Alternate value	Value at date of death
1	Stocks	\$7,349,923.79	\$7,407,344.79
	Bonds	51,990.17	52,212.82
	See Schedule Attached which includes accrued interest and dividends de- clared as of record prior to August 17, 1963 payable subsequent.		
	TOTAL	\$7,401,913.96	\$7,459,557.61
	(also enter under the Recapitulation, Schedule O)		

ESTATE OF CHARLES DELMAR

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SCHEDULE C

MORTGAGES, NOTES, AND CASH

Did the decedent, at the time of his death, own any mortgages, notes, or cash? ☒ Yes ☐ No

Item No.	Description	Subsequent valuation date	Alternate value	Value at date of death
1	American Security and Trust Company, Washington, D. C. *	8/17/64	\$ 46,336.26	\$ 46,336.26
2	The Riggs National Bank of Washington, D. C. *	8/17/64	462,591.14	462,591.14
3	The National Savings and Trust Company, Washington, D. C. *	8/17/64	10,131.15	10,131.15
4	National Bank of Washington, Washington, D. C. *	8/17/64	52,134.18	52,134.18
5	The Chase Manhattan Bank, New York, N. Y. *	8/17/64	55,919.57	55,919.57
6	Note, Joe Z. James, dated September 7, 1962, principal amount \$7,000.00 at 6%, payable at \$50.00 per month. Principal balance at date of death \$6,250.00	8/17/64	6,250.00	6,250.00
7	Accrued interest as at 8/17/63	8/17/64	92.89	92.89
* Checking account				
TOTAL			\$633,455.19	\$633,455.19
(also enter under the Recapitulation, Schedule O)				

ESTATE OF CHARLES DELMAR

Page 11

SCHEDULE D

INSURANCE

1a. Was any insurance on life of decedent receivable by his estate? ☒ Yes ☐ No

1b. By beneficiaries other than estate? ☒ Yes ☐ No

2. Was there any insurance on the decedent's life which is not included in the return as a part of the gross estate?

☒ Yes ☐ No

If "Yes," a complete explanation as to all such insurance must be submitted.

Item No.	Description	Subsequent valuation date	Alternate value	Value at date of death
	Massachusetts Mutual Life Insurance Co.:			
1	Policy No. 1275 440 Beneficiary— Mareen D. Braddock	Sept. '63	\$10,000.00	\$10,000.00
2	Policy No. 1 409 293 Beneficiary— Mareen D. Braddock	Sept. '63	10,000.00	10,000.00
3	Policy No. 1 320 707 Beneficiaries— Mareen D. Braddock and Roland Haddaway del Mar	Sept. '63	15,000.00	15,000.00
4	Policy No. 594 793 Beneficiary—Estate of Charles F. Delmar	8/18/64	204.00	204.00

NOTE:

Massachusetts Mutual Life Insurance Policies Nos. 1, 491 064 and 1, 271 654 each in face amount of \$50,000.00 on life of decedent owned by State Loan and Finance Corporation, 1200 - 18th Street, N. W., Washington, D. C.

Forms 712 attached

TOTAL

\$35,204.00

\$35,204.00

(also enter under the Re-
capitulation, Schedule O)

ESTATE OF CHARLES DELMAR

Page 13

SCHEDULE M

BEQUESTS, ETC., TO SURVIVING SPOUSE (MARITAL DEDUCTION)

If the decedent died testate, the person or persons filing the return should answer the following questions. Only question 4 should be answered in case the decedent died intestate. If the answer to any question is "Yes," full details should be submitted with the return.

1. Has any action been instituted to contest the will or any provision thereof affecting any property interest listed on this schedule or for construction of the will or any such provision? ☐ Yes ☐ No

2a. Had the surviving spouse the right to declare an election between (i) the provisions made in his or her favor by the will and (ii) dower, curtesy, or a statutory interest? ☒ Yes ☐ No

2b. If answer to question 2a is "Yes," has the surviving spouse renounced the will and elected to take dower, curtesy, or a statutory interest? ☒ Yes ☐ No

2c. Elected to take under the will. ☐ Yes ☒ No

2d. Does the surviving spouse contemplate renouncing the will and electing to take dower, curtesy, or a statutory interest? ☐ Yes ☐ No

3. According to the information and belief of the person or persons filing the return, is any action described under question 1 designed or contemplated? ☐ Yes ☐ No

4. According to the information and belief of such person or persons, has any person other than the surviving spouse asserted (or is any such assertion contemplated) a right

to any property interest listed on this schedule, other than as indicated under questions 1 or 3? ☐ Yes ☒ No

Item No.	Description of property interests passing to surviving spouse	Value
1	Statutory one third ($\frac{1}{3}$) of Real and Personal property	\$2,518,830.41
	TOTAL	\$2,518,830.41
	Less: (a) Federal estate tax payable out of above-listed property interests	\$656,410.45
	(b) Other death taxes payable out of above-listed property interests	136,694.38
	Total of items (a) and (b)	793,104.83
	Net value of above-listed property interests (also enter under the Recapitulation, Schedule O)	\$1,725,725.58

ESTATE OF CHARLES DELMAR

Page 29

SCHEDULE O

RECAPITULATION

Schedule	Gross estate	Alternate value	Value at date of death
A	Real estate	\$ 189,504.00	\$ 189,504.00
B	Stocks and bonds	7,401,913.96	7,459,557.61
C	Mortgages, notes, and cash	633,455.19	633,455.19
D	Insurance	35,204.00	35,204.00
E	Jointly owned property	NONE	NONE
F	Other miscellaneous property	11,516.35	11,516.35
G	Transfers during decedent's life ..	NONE	NONE
H	Powers of appointment	NONE	NONE
I	Annuities	NONE	NONE
	TOTAL GROSS ESTATE	\$8,271,593.50	\$8,329,237.15

Sched- ule	Deductions	Amount
J	1. Funeral expenses and expenses incurred in administering property subject to claims	\$ 347,213.15
K	2. Debts of decedent	302,957.17
K	3. Mortgages and liens	30,000.00
	4. Total of items 1 through 3	<u>\$ 680,170.32</u>
	5. Allowable amount of deductions from item 4 (see note*)	\$ 680,170.32
L	6. Net losses during administration	NONE
L	7. Expenses incurred in administering property not subject to claims	NONE
	8. Total of items 5 through 7	\$ 680,170.32
M	9. Bequests, etc., to surviving spouse—Marital deduction	\$1,725,725.58
	10. Adjusted gross estate (see note**)	7,591,423.18
	11. Net amount deductible for bequests, etc., to surviving spouse (item 9 or one-half of item 10, whichever is smaller)	1,725,725.58
N	12. Charitable, public, and similar gifts and bequests	<u>1,000,000.00</u>
	TOTAL ALLOWABLE DEDUCTIONS, except specific exemption (totals of lines 8, 11, and 12)	<u>\$3,405,895.90</u>

* Note.—See paragraph 1 of the instructions.

** Note.—Enter at item 10 the excess of "TOTAL GROSS ESTATE" over item 8, if the decedent and his surviving spouse at no time held property as community property. If property was ever held as community property, compute the "Adjusted gross estate" (item 10) in accordance with the instructions and example on page 32, and attach an additional sheet showing such computation.

ESTATE OF CHARLES DELMAR

PROOF OF FEDERAL ESTATE TAX

Gross Estate		\$8,271,593.50
Debts and Claims	\$ 680,170.32	
Insurance	35,000.00	
Dividends	1,431.94	716,602.26
		<hr/>
Probate Estate for Distribution		\$7,554,991.24
		<hr/>
Wife's 1/3rd share on election		\$2,518,330.41
Widow's Allowance		500.00
		<hr/>
Gross to Widow for Marital Deduction		\$2,518,330.41
Less taxes:		
1/3rd Federal estate tax	\$ 656,410.45	
Wife's D. C. inheritance tax	77,531.73	
1/3rd D. C. estate tax	59,162.65	793,104.83
		<hr/>
Marital Deduction		\$1,725,725.58
		<hr/>
Gross Estate		\$8,271,593.50
Debts and Claims	\$ 680,170.32	
Marital Deduction	1,725,725.58	
Exemption	60,000.00	
Charitable Bequests	1,000,000.00	3,465,895.90
		<hr/>
Taxable Estate		\$4,805,697.60
		<hr/>
Gross Tax		\$2,345,789.49
Credit State Death Tax		376,558.13
		<hr/>
Net Federal Estate Tax		\$1,969,231.36
		<hr/>

Explanation of Changes to Deductions

Schedule M—Marital Deduction

Net Amount Deductible	\$1,725,725.58	\$1,727,174.73
Increase	1,449.15	

The marital deduction has been adjusted as follows:

Wife's share of residue:

Adjusted gross estate, returned		\$7,591,423.18
Changes: Schedule B	\$ 7,262.19	
Schedule J	11,119.15	
Schedule K	(389.34)	+ 17,992.00

Adjusted gross estate, corrected		\$7,609,415.18
Less: Insurance	\$35,000.00	
Dividends on insurance	1,338.06	- 36,338.06

		\$7,573,077.12
Less: Administration expenses claimed in Fiduciary Return		- 1,805.65

		\$7,571,271.47
Less: D.C. Estate Tax	\$ 182,497.28	
Federal Estate Tax	1,977,800.54	2,160,297.82

Residue		\$5,410,973.65
---------	--	----------------

Wife's share of residue (1/3)		\$1,803,657.88
Plus: Widow's allowance		+ 500.00

		\$1,804,157.88
Less: D.C. Inheritance Tax		76,983.71

Corrected marital deduction		\$1,727,174.17
-----------------------------	--	----------------

(Difference of \$.56 is due to rounding of decimals)

Remarks:

The claim for refund in the amount of \$367,998.58 filed on June 25, 1965, with respect to the above estate has been disallowed. Decedent's spouse's share of the estate is to be computed after deduction of Federal and District of Columbia estate taxes. *Herson v. Mills*, Dist. Ct. D.C., 221 Fed. Supp. 714 (1963).

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

C L A I M

Form 843
(Rev. Mar. 1960)

District Director's Stamp
(Date Received)

To be filed with the District Director where
Assessment was made or tax paid

The District Director will indicate in the block below the
kind of claim filed, and fill in where required.

- ☒ Refund of Taxes Illegally, Erroneously, or
Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used
in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate,
gift, or income taxes.)

Please Type or Print Plainly

Name of taxpayer or purchaser of stamps Estate of
Charles Delmar
Number and street The Riggs National Bank of Wash-
ington, D. C.
City, town, postal zone, State 800 17th Street, N. W.
Washington, D. C. (Att'n E. B. Shaw)

Fill in applicable items—Attach letter size sheets
if space is not sufficient

1. Social security number
2. If an employer, enter employer identification number
3. District in which return (if any) was filed Maryland
4. Name and address shown on return, if different from
above
5. Period—if for tax reported on annual basis, prepare
separate form for each taxable year
From , 19 , To 19
6. Kind of tax Estate

7. Amount of assessment \$1,969,231.36
Dates of payment November 16, 1964
8. Date stamps were purchased from Government
9. Amount to be refunded \$367,998.58 plus*
10. Amount to be abated (not applicable to income, estate, or gift taxes)
11. The claimant believes that this claim should be allowed for the following reasons:
See Attachment.

*or such greater or lesser sum as may result from proper application of the law to the basis of the claim.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed ROLAND H. DEL MAR

The Riggs National Bank of Washington,
D. C., by its Vice President
E. B. SHAW, *Co-executors*

Dated June 24, 1965.

ATTACHMENT

In the Federal estate tax return filed by the Estate of Charles Delmar on or about November 16, 1964, there was claimed as a marital deduction the amount to which the surviving spouse was entitled under Section 18-211, District of Columbia Code (1964)—she having renounced all claim to any and all devises and bequests made to her by the Will of her deceased husband.

In calculating the amount of the deduction, otherwise in the amount of \$2,518,830.41, it was reduced by Federal estate tax in the amount of \$656,410.45, District of Columbia estate tax in the amount of \$59,162.65, and District of Columbia inheritance tax in the amount of \$77,531.73.

Accordingly, the marital deduction claimed was in the amount of \$1,725,725.58.

This claim is basically predicated upon the allowability of a marital deduction in the amount of \$2,436,147.54. It is asserted that such amount should not be reduced for either the Federal or District of Columbia estate tax.

Claim is also made for such overpayment of tax as may result from the allowance as a deduction of legal costs arising from successful prosecution of the principal claim.

The Executors filing this claim filed the return involved and are still acting in their fiduciary capacity.

June 24, 1965

Finance Office
Revenue Division
Inheritance and Estate Tax Section
Municipal Center
Washington 1, D. C.

Re: Estate of Charles Delmar, Deceased

Gentlemen:

On or about November 17, 1964, the undersigned executors filed with your office an inheritance tax return and, with respect to the shares of the Estate of the above-entitled individual to be received by Jacqueline Delmar and Roland H. del Mar, paid inheritance tax in the respective amounts of \$76,691.34 and \$118,345.18. Thereafter, District of Columbia estate tax in the amount of \$180,644.49 was assessed and paid.

In the Federal estate tax return filed, the amount of property passing to Jacqueline Delmar, surviving spouse of the decedent, was, for purposes of the marital deduction allowance provided for in the Internal Revenue Code of 1954, reduced by a proportionate part of the Federal and

District of Columbia estate taxes deemed attributable to her share. Concurrently herewith the executors of this Estate are filing a claim for refund of Federal estate tax based primarily upon the proposition that the amount allowable for marital deduction purposes is not to be so reduced, together with such refund as may arise from legal costs incurred in the successful prosecution of the refund claimed.

It is anticipated that litigation will be required to reach a final determination of the Federal refund claimed. Any final determination favorable to the Estate will automatically give rise to a refund of District of Columbia estate tax. Parenthetically, it will be noted that such would also slightly increase the District of Columbia inheritance taxes above noted.

Claim for refund is hereby made for any reduction in District of Columbia estate tax arising from the allowance of the Federal refund claim filed. It is requested, however, that action on this claim be held in abeyance until such time as the Internal Revenue Service or the courts have passed upon the merits of the Federal claim.

Respectfully submitted,

ROLAND H. DEL MAR

The Riggs National Bank of
Washington, D. C.

By E. B. SHAW
Vice President

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding Probate Court

Administration No. 109449

In re Estate of CHARLES DELMAR, Deceased.

Renunciation of Devises and Bequests

I, Jacqueline Delmar, widow of Charles Delmar, late of the City of Washington, District of Columbia, deceased, do hereby renounce and quit all claim to any devise or bequest made to me by the last Will of my husband exhibited and proved according to law; and I elect to take in lieu thereof my legal share of the real and personal property of my said spouse.

Dated the 1st day of November, 1963

JACQUELINE DELMAR
Jacqueline Delmar
(Mrs. Charles F. Delmar)

DISTRICT OF COLUMBIA) ss:

Personally appeared before me this 1st day of November, 1963, Jacqueline Delmar, being personally well known to me as the person who executed the foregoing and annexed renunciation and election bearing date on the 1st day of November, 1963, and acknowledged the same to be her act and deed.

JUDITH C. HUSE
Notary Public
District of Columbia

My Commission Expires May 31, 1967

FILED
Nov. 7, 1963
Theodore Cogswell
Register of Wills, DC
Clerk of the Probate Court
(SEAL)

* * *

Mr. Brown: In conclusion, Your Honor, I would like to note that while in my Points and Authorities I cite a substantial number of Law Review Articles on the subject generally, there just came to my attention an article which is captioned or entitled:

"The Federal Estate Tax Burden borne by
a Decedent's Widow"

and it appears in the 1964 Michigan Law Review at page 1499 which is now in the June 1966 edition and this is, to my knowledge, the only law review devoted entirely to this particular point. I would call Your Honor's attention to the fact that that article was written by Professor Douglas A. Kahn who was counsel for the plaintiff in the case of Herson v. Mills, but the article is very exhaustive.

23 Of course, Your Honor, it is an article which favors my view, but it is nevertheless a very exhaustive one, giving the pros and cons.

I commend it to the Court as being an excellent exposition of the subject.

The Court: Well, now, that was a very earnest young man.

Mr. Brown: Yes.

The Court: And there was definitely opposition in that case.

Mr. Brown: Yes—well, one of my former law partners, who is now on the Joint Committee on Internal Revenue Taxation, knows Mr. Kahn and his brother also, who is District Attorney of Internal Revenue in Atlanta, and he called to my attention this article, because he said that Douglas Kahn was an extremely able young man.

The Court: Yes, he is.

Well, I thank both of you gentlemen for your very able presentation.

As for the Court making a rule about apportioning the federal estate tax, one of our Judges in a case a short time ago thought that a stepchild was an heir of a
24 decedent and this question went to the Court of Appeals.

In the interval between the decision in the District Court and the time the Court of Appeals reversed, however, petitions were received in the Probate Office in estates where people who were stepchildren of the decedent were claiming to be heirs.

One case involved a contest between the Government and stepchildren as to whether there was an escheat or whether the stepchildren took as heirs. This caused confusion and uncertainty.

I mention this because in the instant case a decision that the Court may apportion the estate tax and exempt the widow from sharing the tax would mean that the decision in this particular case would have to be dealt with in other cases in the Probate Office before the matter could be passed upon by the Court of Appeals. Just as there are people who want the widow not to have to share, in this estate tax, there are also people who claim that she should.

I think, under the circumstances, that I will have to deny your motion, Mr. Brown.

25 Mr. Brown: Well Your Honor, have you reached that decision without reading the briefs?

The Court: I have read the briefs; I read them before today.

Mr. Brown: I see, Your Honor.

Well, if the Court please, I didn't expect much to the contrary—I will be perfectly frank with you.

(Laughter)

But I think that the Court could reach a contrary decision in that Herson versus Mills included no consideration

as to the meaning of these statutes containing the term "surplus" in which the wife is to take a—

The Court: Well, I tell you, that doesn't bother me in the least.

Mr. Brown: No?

The Court: No, and I will tell you why: This phraseology about surplus has been in there for some time and laws have been passed since then. We have a recent law, as a matter of fact, does provide for the giving of 26 five hundred dollars for an allowance to the surviving spouse or for the children, well, that goes in ahead of this distribution of the surplus that we are talking about, and there are other things that can go in there, too.

Mr. Brown: Well, it is entirely possible that the meaning of the word "surplus" as originally intended, was consciously accepted as being a change of the 1916 Act, but I say, if this is so, then it can also consciously be changed by reason of the enactment of the 1948 Act; but to get back to my original point, I fully expected that Your Honor would deny my motion.

I was very happy that the motion was heard by you, because I felt that if any Judge on the District Court would reverse Henson versus Mills, then it would be its author.

However, I held out, certainly, no great hopes for myself. Now as a matter of fact, Your Honor, this question is, I believe, of tremendous importance—the overall question. I got into it, of course, as advocate, but before I was through, to me to was a social problem. Its academic interest far exceeds my personal interest in a fee.

The Court: Well, I am very much interested in 27 that point about how they treat the problem in these different places, because I think they ought to treat common law jurisdictions exactly the same as they do the others, but—

Mr. Brown (Interposing): It seems to me—well, of course, this case, whichever way it is decided, is going to the Court of Appeals and, frankly, I expect the Court of Appeals to hear the case en banc—because I believe that Hepburn versus Winthrop was so undermined by Riggs versus Del Drago—

The Court: I don't see why you say that. All this case that you mentioned last decided was that New York could provide a method of apportionment.

Mr. Brown: But, in so stating, they turn down the argument of the Federal Estate Tax Law attorneys on where the burden of tax shall fall.

The Court: Oh well, I don't know who—

Mr. Brown: One case I cited to Your Honor was the In Re Hamlin case which considered the New York apportionment law.

The Court: I remember in that case that definite point was raised.

Mr. Brown: Yes and I say in Hepburn and Win-
28 throp the Court reached its decision on the necessary
 modifications of the Federal Statute while Del Drago
says you don't look to the Federal Statute to see where
the tax is borne.

The Court: Well, the thing about it is, while you seem to think I had gone to that decision for the purpose of at least some of this determination, I thought that case held that it was a transfer tax.

Mr. Brown: Oh—well, that may have been a point involved, but insofar as apportionment was involved, it reached its result by imposing the tax burden on the personal residuary estate in the hands of the executors on the necessary implications of the Federal Statute which stated that the tax is to be paid by the executor before distribution of the estate. The language says that it is in the nature of an administrative expense so from this necessary implication we put the tax burden on the residue.

Under Riggs versus Del Drago however they didn't look

to the necessary implications of the Statute—they looked to the local law.

The Court: Well, I thought that they recognized that there was a transfer tax there and they were simply saying that New York was within her rights in saying—

29 Mr. Brown (Interposing): In Del Drago?

The Court: Yes.

Mr. Brown: Oh—that is correct.

The Court: In saying that it could be apportioned the tax could be apportioned, by New York.

Mr. Brown: Yes.

The Court: They might properly do that.

Mr. Brown: But Your Honor, you will see also that in Riggs vs. Del Drago the Court stated as follows: (And I think this is the key to the whole case)

“It was argued to the Supreme Court that under Section 826(b) of the 1939 Code which commanded that the tax be paid by the executor before distribution of the estate, this necessarily required the tax to be borne by the entire estate and there could not be an apportionment because of the statutory provision of the Federal Law.”

The Court said:

“That section does not command that the tax is an inflexible charge on the residuary estate. To read the words ‘the tax shall be paid out of the estate’ as meaning
30 ‘the tax “shall be paid out of the residuary estate” is to distort the plain language of the section and to create an obvious fallacy. In short, section 826(b) simply provides—”

And continuing.

In other words, Your Honor, they are saying that the Federal Statute is not controlling, as you argue that it is, and it was the basis for the series of decisions ruling against the apportionment.

The Court: Well I didn't think that at all. I read those cases both for and against apportionment when I had this

other case under consideration and I think there is no question about it being a transfer tax; that is, the Federal Estate tax being a transfer tax, not a tax on inheritance.

Mr. Thibodeau: May I be heard, Your Honor?

The Court: Yes.

Mr. Thibodeau: You have stated, Your Honor, that you have denied the plaintiff's motion in this case.

The Court: Yes.

Mr. Thibodeau: Does this also mean you are granting, necessarily, the Defendant's cross motion?

The Court: Now, this is a motion of plaintiffs for summary judgment and I am denying that motion.

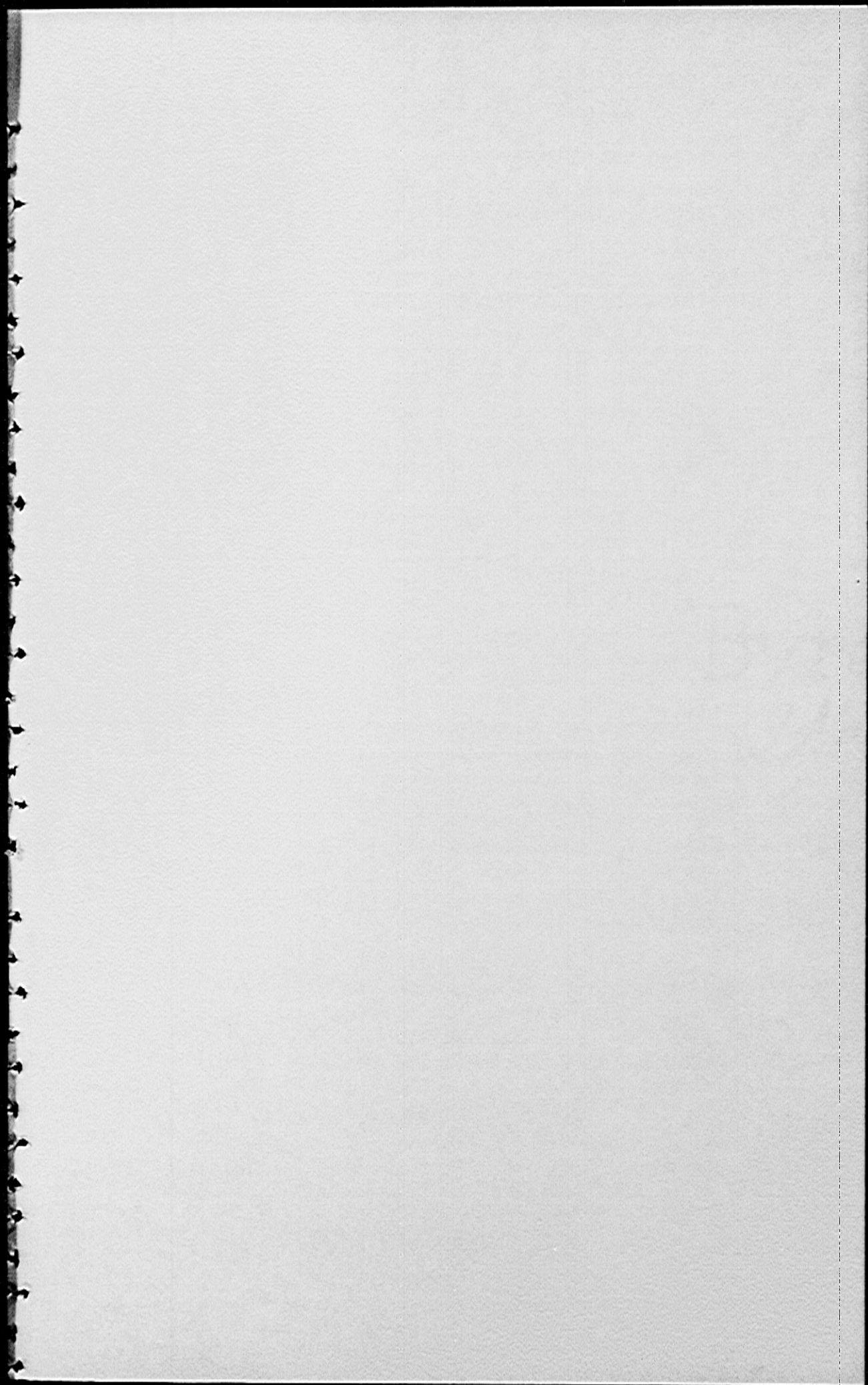
Mr. Thibodeau: Yes.

31 The Court: And yours is the cross-motion.

Mr. Thibodeau: Yes.

The Court: I am granting that.

Mr. Thibodeau: Thank you very much.



BRIEF AND APPENDICES FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR and THE RIGGS NATIONAL BANK OF
WASHINGTON, D. C., as Executors of the Estate of
CHARLES DELMAR, Deceased, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From Order and Judgment of the United States
District Court

HARRY L. BROWN

Counsel for Appellants

200 World Center Building
Washington, D. C. 20006

Of Counsel:

ALVORD AND ALVORD

200 World Center Building
Washington, D. C. 20006

BRACKLEY SHAW, ESQUIRE

SHAW, PITTMAN, POTTIS,

TROWBRIDGE & MADDEN

910 17th Street, N. W.

Washington, D. C. 20006

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 28 1967

Nathan J. Paulson
CLERK

STATEMENT OF THE QUESTION PRESENTED

In determining, as though he had died intestate, the "surplus" of a decedent's estate, a statutory share of which passes to his surviving spouse in accordance with the applicable law of the District of Columbia by virtue of her renunciation of his will, such share in either case otherwise qualifying for the marital deduction, is the "surplus" to be determined before or after estate taxes, both Federal and local?

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A widow who, by virtue of her renunciation of the decedent's will, receives a share of the estate in accordance with the laws of the District of Columbia, takes such share free of any estate tax burden	7
(a) It is or should be the rule in the District of Columbia that, absent a local applicable statute or a controlling provision in the will dealing therewith, the Federal estate tax is to be equitably apportioned among the persons interested in the estate in the proportions that the share of each contributes to the tax burden	7
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(b) No local statutory provision prevents a widow of an intestate decedent, or one renouncing under a will, from taking free of any estate tax burden her share of the "surplus" so long as her share otherwise qualifies for the Federal estate tax marital deduction	24

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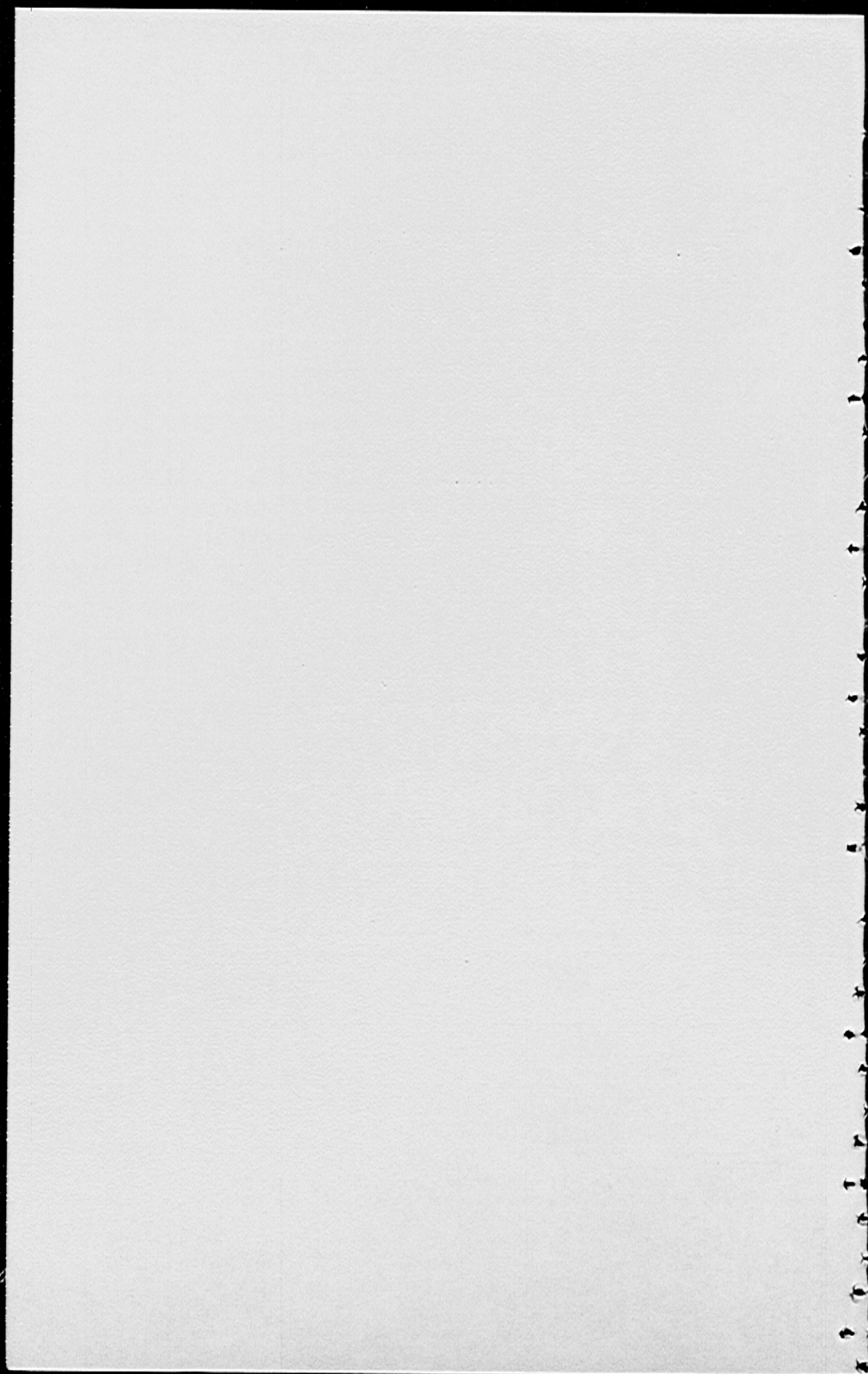
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR and THE RIGGS NATIONAL BANK OF
WASHINGTON, D. C., as Executors of the Estate of
CHARLES DELMAR, Deceased, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From Order and Judgment of the United States
District Court

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

In the Federal estate tax return filed by appellants, the amount of the marital deduction claimed for Federal estate tax purposes was determined on the theory that the surviving widow's elective share of the decedent's estate, though less than one-half of the adjusted gross estate,

was subject to and must be reduced by a part of the Federal and District of Columbia estate taxes. Thereafter, the Executors on June 24, 1965 filed a timely claim for refund on the basis that the amount otherwise constituting the allowable marital deduction should be reduced by neither of such taxes. Such claim was denied by the District Director of Internal Revenue on February 4, 1966.

Thereafter, under Section 1346(a)(1) of Title 28 of the United States Code, appellants filed with the United States District Court for the District of Columbia a Complaint seeking the refund of tax on the basis asserted in the claim for refund filed. Still thereafter, appellants filed a Motion for Summary Judgment, supported by affidavits, to which appellee responded by a Cross-Motion for Summary Judgment.

After hearing oral argument, the Court below, on March 7, 1967, filed its Order and Judgment denying appellants' Motion for Summary Judgment and granting appellee's Cross-Motion for Summary Judgment and dismissing the action with prejudice.

On May 2, 1967, appellants noted their appeal to this Court pursuant to Rule 73(a) of the Federal Rules of Civil Procedure. Jurisdiction of this Court is invoked under the provisions of Sections 1291 and 1294, Title 28, of the United States Code.

STATEMENT OF THE CASE

Charles Delmar, a resident of Washington, D. C., died August 17, 1963, testate, survived by a widow and one son, leaving, before death duties, a probate estate for distribution (plus real estate) having a date of death value in excess of \$7.6 million. (Plfs. Exh. 2 (pp. 1 and 2) to Plfs. Exh. A; Plfs. Exh. 2 to Plfs. Exh. B.)

By the terms of his Will (Paragraph (11)), the residue of the decedent's estate was devised to Trustees to be held

for the benefit of decedent's son, Roland H. del Mar, and provision was made (Paragraph (14)) that the Executors should pay out of the residuary estate (without any right of reimbursement) all estate, inheritance and succession taxes. (Plfs. Exh. 1 to Plfs. Exh. A.)

The decedent's surviving spouse, under Section 18-211 of the District of Columbia Code (1961 Ed.), filed a written renunciation of the provision made for her in the Will and elected to take her one-third statutory share in the real and personal estate of the decedent. (Complaint and Ans. para. 4; Plfs. Exh. 7 to Plfs. Exh. A.)

In the Federal estate tax return filed by the Executors, the amount of the marital deduction claimed for Federal estate tax purposes with respect to the wife's elective share was determined on the theory that such share, though less than one-half of the adjusted gross estate, was subject to, and must be reduced by, a part of the Federal and District of Columbia estate taxes. (Plfs. Exh. 2 (p. 34 "Proof of Federal Estate Tax") to Plfs. Exh. A.) On being advised that they had proceeded upon an erroneous basis, the Executors, on June 24, 1965, filed a claim for refund on the basis that the amount otherwise constituting the allowable marital deduction should be reduced by neither of such taxes. (Complaint and Ans. para. 8; Plfs. Exh. 5 to Plfs. Exh. A.) Such claim was denied by the District Director of Internal Revenue on February 4, 1966. (Complaint and Ans. para. 9; Plfs. Exh. 3 (p. 3) of Plfs. Exh. A.)

Were there no marital deduction provided for in the statute, the Federal estate tax on decedent's estate would have amounted to \$2,932,752.83 which would have been shared \$977,584.28 by the widow and \$1,955,168.55 by the residuary estate. Under the return as filed (with the marital deduction as therein claimed), the Federal estate tax amounted to \$1,976,246.65 (a reduction of \$956,506.18) of which the widow's share amounted to \$658,748.88, while that of the

residuary estate amounted to \$1,317,497.77. Under appellants' theory of this proceeding, the Federal estate tax would be reduced to \$1,620,303.83 (or a further reduction of \$355,942.82). The Federal estate tax burden of the widow would be eliminated (a reduction of \$658,748.88), while that borne by the residuary estate would amount to \$1,620,303.83 (or an increase to it of \$302,806.06). (Plfs. Exh. 1 to Plfs. Exh. B.)

On appellants' theory as to the sharing of the tax burden, however, the Federal estate tax on the residuary estate would still be \$334,864.72 smaller than if there were no marital deduction provision.

STATUTES INVOLVED

The relevant part of pertinent statutes, both Federal and local, are set forth in Appendix B.

STATEMENT OF POINTS

The points upon which plaintiffs-appellants rely on appeal are:

1. The Court below erred in ordering, adjudging and decreeing that the Plaintiffs' Motion for Summary Judgment "be and the same is hereby overruled and denied,"
2. The Court below erred in ordering, adjudging and decreeing that "the Defendant's Motion for Summary Judgment be and the same hereby is granted and that this action is hereby dismissed with prejudice," and
3. The Court below erred in determining, by the aforesaid action, that the statutory "surplus" of the decedent's estate, a one-third share of which passed to his surviving spouse by virtue of her renunciation of his will, and otherwise qualified for the marital deduction for Federal estate tax purposes, was to be determined after estate taxes, both Federal and local.

SUMMARY OF ARGUMENT

1. The basis on which *Hepburn v. Winthrop*, *infra*, rests, insofar as it may be said to have established for the District of Columbia a rule against apportionment of estate taxes, has been completely nullified and destroyed. Accordingly, *Herson v. Mills*, *infra*, rests upon an erroneous foundation.

2. Based upon logic and equity, it should be the law in the District of Columbia that absent a local applicable statute specifically to the contrary, the estate tax, in the case of intestacy (which is applicable where, as here, a renunciation is involved), should be apportioned among those sharing in the estate in the proportion to the amount received by each *and* as each receipt contributed to the overall tax imposition.

3. Whether or not such rule be generally adopted by this Court, a limited rule of apportionment can and should be adopted by it in the marital deduction area in order to reach the result intended by the Congress.

4. Congress intended, by the Revenue Act of 1948, to extend to taxpayers in common law states and the District of Columbia the advantages of "estate splitting" otherwise available only in community property states. If such equality is to be accomplished for persons in noncommunity property jurisdictions, the surviving spouse must be permitted to take his or her qualifying interest in the estate free from Federal estate taxes. If such surviving spouse must pay Federal estate taxes on his or her qualifying interest, such spouse will receive less than his or her counterpart in a community property state, and the purpose of Congress will be thwarted. To accomplish such equality, this Court must adopt a rule of equitable apportionment of the tax, such rule being no more than a facet of the doctrine of contribution otherwise followed by the District of Columbia courts.

5. Adoption of an apportionment rule for the District of Columbia is desirable as being equitable; the overwhelming trend in the United States is to that end; and adoption of such rule by this Court will further accomplish the desirable end of avoiding conflict in marital property rights with the neighboring States of Virginia and Maryland.

6. The rule of stare decisis should not be applied and this Court should re-examine the District of Columbia position on apportionment of the Federal estate tax in light of *Riggs v. Del Drago*, *infra*, and the purpose and intent of the Congress in enacting in 1948 the marital deduction provision of the Federal estate tax law.

7. The District of Columbia courts in seeking to apply the doctrine of equitable apportionment to the facts are not faced with the same problem of statutory construction as are the courts of the several States.

8. The word "surplus," as used in Sections 18-701 and 18-703 of the District of Columbia Code, was originally adopted as meaning *before* any death duty. *If*, as the result of the enactment of the Federal Estate Tax Law in 1916, it was necessary, by interpretation, to change the meaning of the word "surplus" to mean *after* death duties, then it is also necessary (at least in the marital deduction area) to restore to the word "surplus" its original meaning as the result of the marital deduction provisions of the Federal Estate Tax Law enacted by the Congress in 1948.

9. It is and always has been the policy of this Court to protect the wife by securing for her a reasonable portion of her husband's estate.

ARGUMENT

A widow who, by virtue of her renunciation of the decedent's will, receives a share of the estate in accordance with the laws of the District of Columbia, takes such share free of any estate tax burden.

- (a) It is or should be the rule in the District of Columbia that, absent a local applicable statute or a controlling provision in the will dealing therewith, the Federal estate tax is to be equitably apportioned among the persons interested in the estate in the proportions that the share of each contributes to the tax burden.

At the outset, appellants recognize that the issue here presented, in essence, was resolved adversely to them in *Herson v. Mills*, 221 F. Supp. 714 (D.C. D.C. 1963) wherein the Court stated that:

“ * * * It is a general rule that where neither the will of the decedent nor the law [statutory?] of the jurisdiction provides otherwise, the burden of the federal estate tax rests, like other administrative expenses, on the general estate and is not apportioned among the beneficiaries of the estate. * * * ”

In reaching its decision, the Court relied upon *Hepburn v. Winthrop*, 65 App. D.C. 309, 83 F. 2d 566, 105 A.L.R. 310 (C.A.D.C. 1937). Appellants assert that the principle applied was erroneous; that it is not supported by the *Hepburn* decision; and that, if so supported, such latter decision is predicated upon an erroneous concept of the law and should be appropriately reversed, limited or modified as to permit reaching of the result herein contended for.

Matters To Be Considered

To resolve the problem, it is desirable to first review at considerable length (a) the development of the so-called (former) “general rule” against apportionment, (b) the subsequent destruction of its basis by the Supreme Court in 1942, and (c) the overwhelming modern trend to appor-

tionment. In view of the specific limited problem presented, it is also necessary to review (d) the Congressional effort, by the marital deduction provision of the Federal Estate Tax Law, to provide for full equalization of the estate tax burden between community property and common law states, and (e) the history underlying pertinent local statutory provisions dealing with intestate descent and distribution.

Development of Rule Against Apportionment

Prior to the Revenue Act of 1916, all death duties imposed by the Congress had been of the inheritance tax type. Section 29 of the Act of June 13, 1898 (30 Stat. 448, 464), in imposing such a tax, expressly provided that "all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed [of property], as aforesaid, shall be exempt from tax or duty." By amendment of such legislation (adopted by the Act of March 2, 1901, 31 Stat. 938, 949), provision was made that any such tax paid "shall be deducted from the particular legacy or distributive share on account of which the same is charged."

Under those provisions, no question existed as to where the burden of the tax was to be placed or as to whether the surviving spouse bore any tax burden. In 1916, however, the Congress enacted an estate tax (as distinguished from an inheritance tax) and nothing in the bill, as originally introduced, gave any indication from what funds the estate tax was to be paid. In the Senate, however, the bill was amended by adding the language* presently contained in section 2205, Internal Revenue Code of 1954 (section 208, Revenue Act of 1916) which, notwithstanding dictum to the contrary contained in two Supreme Court decisions in 1924,

* i.e., that "it being the purpose and intent * * * that so far as is practicable and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution."

was almost uniformly misconstrued until the further decision by that Court in *Riggs v. Del Drago*, *infra*, in 1942.

After the enactment of the original Federal Estate Tax Law, the state courts were immediately confronted with the problem of apportionment, *i.e.*, what persons or interests should bear the ultimate burden of the tax. The first case bearing on the problem arose in New Hampshire in 1918 (*Fuller v. Gale*, 78 N.H. 544, 103 A. 308). There the decedent left certain specific and residuary legacies. The question of which of those funds was to bear the tax was one of the several issues before the court. It considered and disposed of the problem in one paragraph, holding that the tax was to be paid pro rata by all sharing in the estate. In arriving at the result, it reasoned that in the absence of any direction in the will, the tax was to be apportioned among the beneficiaries. The court only made reference to the Act as a whole; it did not advert to any section as controlling.

In the same year Illinois, in the administration of its state inheritance tax law, was presented with the question whether, in determining the amount to be subjected to the state tax, the Federal estate tax was deductible. Holding that the latter could properly be considered "as a debt or an expense of administration of the estate" (deductible by statute in determining the amount subject to the inheritance tax) *because* "made payable by the executor or administrator to the collector or deputy collector by the express provisions of the statute," the court held for the taxpayer. *People v. Pasfield*, 284 Ill. 450, 120 N.E. 286, 288 (1918). On the reasoning that the tax was "an expense of administration," Connecticut reached the same result with respect to the same problem. *Corbin v. Townshend*, 92 Conn. 501, 103 A. 647 (1918). *Contra: Hazard v. Bliss*, 43 R.I. 431, 113 A. 469 (1921).

Also in the same year a Surrogate's Court in New York (*In re Douglass' Estate*, 171 N.Y.S. 956, 104 Misc. Rep. 359

(1918)) had occasion to consider the newly-enacted Federal Estate Tax Law. There the testator left a will providing for certain specific bequests with the residue to his children, making no provision as to where the Federal estate tax impact should fall. The Court held that a rule of equitable apportionment should be applied. It stated as follows:

"The will being silent upon the question, it should be decided by the court upon principles of equity and justice, and it would be inequitable to charge the children of the testator, who are residuary legatees, with the payment of this tax while exempting from such payment collateral relatives who are recipients of substantial testamentary gifts from the testator. It seems, therefore, that the tax should be deducted proportionately from each legatee, and that the amount to be deducted is that proportion of the entire tax assessed against the estate which the individual legacy bears to the entire net estate. * * *"

Nine months thereafter the same question, in another proceeding, reached the New York Court of Appeals in *In re Hamlin*, 226 N.Y. 407, 124 N.E. 4, 7 A.L.R. 701 (1919). Although *In re Douglass' Estate*, *supra*, was cited to that Court as authority, it ruled that the tax was payable from the residuary estate and was not to be apportioned. In reaching its decision, the Court referred to the Federal inheritance tax statute of 1898 which, as amended, provided for payment by each legatee and asserted that had "the Congress desired to provide for an apportionment of a tax amongst legatees, it might readily have used language adopted by that body" in 1901. It continued that the "plain intent and obvious meaning of the Act of Congress * * * indicate clearly that the Act imposes an 'estate tax' as distinguished from an inheritance tax, [and] that the tax is payable by the estate rather than by the legatees." It concluded that:

"* * * As to the equity of requiring payment of the tax by the residuary legatees and relieving the remain-

ing legatees from any contribution to the same, the question is susceptible of conflict of opinion. The Congress has spoken, and it is our function to interpret, not to legislate."

Massachusetts was called upon to adjudicate the same matter later in that year. *Plunkett et al. v. Old Colony Trust Company et al.*, 223 Mass. 471, 124 N.E. 265, 7 A.L.R. 696 (1919). Here, too, the Court, relying on *In re Hamlin*, *supra*, decreed that the residue should bear all the Federal estate tax, concluding that:

" . . . The [estate tax] law makes no provision for apportionment of the tax among legatees, but leaves it simply to be paid out of the estate before distribution is made."

Before the question came to the United States Supreme Court, a lower court in Pennsylvania (*Newton's Estate*, 74 Pa. Super. 361 (1920)) had adopted the New York and Massachusetts position, while Kentucky (*Hampton's Administrators v. Hampton*, 188 Ky. 199, 221 S.W. 496, 10 A.L.R. 515 (1920)) ruled that in the case of intestacy every portion of the estate should bear its proportionate part of the tax. The latter Court, with complete justification as is evidenced by *Riggs v. Del Drago*, *infra*, stated that it did "not regard as controlling the fact that the primary duty of paying the tax is imposed upon the executor" by the statute.

Again in *Bemis v. Converse*, 246 Mass. 131, 140 N.E. 686 (1923), however, it was said that the Federal Estate Tax Law contained no provision for the apportionment of the estate tax except the one relating to life insurance (added by section 408, Revenue Act of 1918—the substance of which is presently contained in the first two sentences of section 2206 of the 1954 Code), and that "the presence of this provision indicates that no other apportionment was intended by the Congress."

Although the Supreme Court in *Young Men's Christian Association of Columbus, Ohio v. Davis*, 264 U.S. 47, 51 (1924) and in *Edwards v. Slocum*, 264 U.S. 61, 63 (1924), by dictum, indicated that the distribution of the tax burden among the several beneficiaries was a matter of state regulation, such, until 1942, was generally disregarded by the courts. Thus, in *Farmers Loan and Trust Co. v. Winthrop*, 238 N.Y. 488, 144 N.E. 769 (1924), the Court, although referring to the *Young Men's Christian Association* decision, relied upon *In re Hamlin*, *supra*, for the proposition that the executor could not recover any part of an estate tax from the transferee of a taxable inter vivos transfer. It referred to the "exception" provided in the statute with regard to the proceeds of insurance policies, but stated that such "does not permit the court to create other exceptions by any supposed analogy."

Again in *In re Oakes*, 248 N.Y. 280, 162 N.E. 79 (1928), also involving the question of contribution from an inter vivos transferee whose property was subjected to the estate tax, Judge Cardozo, thereafter to become a Justice of the United States Supreme Court, stated that the burden of the estate tax was *unmistakably* "fixed" by the terms of Federal statute.

In 1937 this Court, in *Hepburn v. Winthrop*, *supra*, was presented with the problem whether the Federal estate tax should be apportioned between real estate and personal property (both comprising the residue of the estate) or whether, since the executors took title only to the personal estate, the tax was payable solely therefrom. In approving the latter source as the one to bear the entire tax burden, the Court relied on *Corbin v. Townshend*, *supra*; *In re Hamlin*, *supra*; *Plunkett v. Old Colony Trust Co.*, *supra*; and *Turner v. Cole*, 118 N.J. Eq. 497, 179 A. 113 (1935) (which, in turn, was based on *Hamlin* and *Plunkett*) stating that so far as it knew "all the cases hold that, failing some provision in the will declaring otherwise, the tax is payable

out of that portion of the residue to which the executor takes title." While recognizing the "reasonableness" of each element of the *taxable* estate bearing its share of the burden, the Court stated that the Congress left that question open to action either by the testator in the will or by the states "through statute"; and that since there was no direction in the will and "no [local] statute dealing with the subject," the Court was required to look "to the Federal statute and the necessary implications from its terms." The Federal statutory provision "that the tax is to be paid by the executor before distribution," stated the Court, "implies that the tax is of the nature of an administration expense," the burden of which fell upon the personal estate.

Still later, bowing to the same reasoning that because "the tax is payable by the executor before distribution," and, therefore, like other charges against the estate, is an expense of administration payable out of the residue, the Supreme Court in New Hampshire reversed its decision in *Fuller v. Gale, supra. Amoskeag Trust Company v. Trustees of Dartmouth College*, 89 N.H. 471, 200 A. 786, 117 A.L.R. 1186 (1938).

That the rule adopted by the foregoing decisions was the "general" or "majority" rule for many years prior to 1942 cannot be denied. On the other hand, however, it cannot be denied that the "question was treated as one of Congressional intent, and thus as a Federal question" (*Wilmington Trust Co. v. Copeland*, 33 Del. Ch. 399, 94 A. 2d 703, 708 (1953))* which was "an erroneous concept of the Federal Estate Tax Act." *Pearcy v. Citizens Bank & Trust*

* "The authorities are in substantial agreement that prior to 1942 it was thought that the Federal statute which imposed the estate tax had * * * pre-empted the field and that it was not open to the state courts to create other or different exceptions." Fleming, *Apportionment of Federal Estate Taxes*, 43 Illinois Law Review 153, 155 (1948). See also Scoles and Stephens, *The Proposed Uniform Estate Tax Apportionment Act*, 43 Minnesota Law Review 907, 913-914 (1959).

Co. of Bloomington, 121 Ind. App. 136, 96 N.E. 2d 923 (1951) and *Re Gallagher's Will*, 57 N.M. 112, 255 P. 2d 317, 37 A.L.R. 2d 149, 163 (1953).

Basis of Rule Against Apportionment Destroyed

That the basis of the rule against apportionment was an invalid one was established by the Supreme Court in 1942 in *Riggs v. Del Drago*, 317 U.S. 95, 87 L. ed. 108, 142 A.L.R. 1131. There, upholding legislation of the State of New York (section 124, Decedent Estate Law) providing for the apportionment of any Federal death tax, the Court stated that:

" * * * Section 826(b) [1939 Code] does not command that the tax is a non-transferable charge on the residuary estate; to read the phrase 'the tax shall be paid out of the estate' as meaning 'the tax shall be paid out of the residuary estate' is to distort the plain language of the section and to create an obvious fallacy. * * * In short, section 826(b) * * * simply provides that, if the tax must be collected after distribution, the final impact of the tax shall be the same as though it had first been taken out of the estate before distribution, thus leaving to state law the determination of where that final impact shall be."

"The result [of that decision] was not only to sustain section 124 of the New York Decedent Estate Law but also to nullify the prior New York decisions, such as the *Hamlin*, *Winthrop* and *Oakes* cases * * * which held that the residue must bear the impact of the federal estate taxes because of the supposed Congressional direction." *In re Gato's Estate*, 97 N.Y.S. 2d 171, 177, 276 App. Div. 651 (1950), *aff'd* without op. 301 N.Y. 653, 93 N.E. 2d 924.

To the decisions cited as having their basis "nullified" must be added *Plunkett et al. v. Old Colony Trust Company*, *supra*; *Newton's Estate*, *supra*; *Bemis v. Converse et al.*, *supra*; and the decision of this Court, *Hepburn v. Winthrop*, *supra*—at least to the extent of its reliance upon

any of the foregoing decisions and upon "the Federal statute and the necessary implications from its terms." *

If, therefore, the last cited decision may be said to have adopted a rule against apportionment for the District of Columbia requiring, in the absence of any contrary direction in the will, the payment of the full estate tax out of the residuary personal estate (see *In re Berger's Estate*, 50 N.Y.S. 2d 550, 551, stating the alleged District of Columbia rule, and *Herson v. Mills*, *supra*), it is now not only proper but also necessary that this Court reconsider its position against apportionment, in the course of which should be weighed the basic principle underlying equitable apportionment, the purpose and intent of the Congress in enacting in 1948 the marital deduction provision of the Federal Estate Tax Law, the necessary (local) implications favoring apportionment to be drawn from the provisions of that statute, and the current, overwhelming trend toward adoption of the apportionment rule.

Basis of Equitable Apportionment Rule

What is the basic principle of the judicially-applied rule of equitable apportionment as well as the apportionment statutes? Trimble, *Federal Estate Taxation—Some Problems in Apportionment (In Absence of Will Provision or in Intestate Estates)*, 44 Ky. Law Journal 366, 370 (1956) states that:

"The basis of the rule of equitable apportionment is that since the tax is imposed upon the entire taxable estate, it is equitable for the entire estate to bear a proportionate share of the burden of the tax."

* "The result of the *Del Drago* decision was to destroy completely the foundation on which the nonapportionment rule had been erected. As a consequence, there has been a complete reversal of the trend of decisions, and the modern trend is definitely in favor of the equitable apportionment of Federal estate taxes." Lauritzen, *Apportionment of Federal Estate Taxes*, Tax Counsellor's Quarterly, Vol. I, p. 69 (1957).

The basis of the rule is nothing more than the equitable principle that the estate taxes should be borne by those whose bequests contribute to the tax burden and, conversely, that all of those whose legacies do not in any way create or add to that burden should not be required to bear it. *Jerome v. Jerome*, 139 Conn. 285, 93 A. 2d 139 (1952). It is an application of the ancient maxim that "equality is equity." That the basic principle is a part of the law of the District of Columbia in other areas admits of no doubt. Cf. *Ottenstein v. Julius Garfinckel & Co.*, 151 A. 2d 925 (1959). In fact, contribution is even allowable between joint tortfeasors (*George's Radio, Inc. v. Capital Transit Co.*, 126 F. 2d 219 (C.A.D.C. 1942)) although barred by the "rigid doctrine of common law" (*Nordstrom v. District of Columbia*, 213 F. Supp. 315, 318 (D.C.D.C. 1963)). Equitable apportionment is simply a facet of that doctrine. *Wilmington Trust Co. v. Copeland*, *supra*.

Limited to the immediate problem here presented, i.e., whether a renouncing widow's share, otherwise qualifying for the marital deduction, should bear any tax, it is submitted that there is every reason for this Court, if not otherwise prevented therefrom by a local statute, to apply the doctrine of equitable apportionment in favor of the surviving spouse. If it fails to do so, "the purpose of Congress will be thwarted." Whittaker and Whittaker, *Equitable Apportionment of Federal Estate Taxes—The Marital Deduction*, 31 Univ. of Kansas City Law Review 266 (1963).

The Congressional Purpose

By the marital deduction provision (section 2056, 1954 Code), equalization of the Federal estate tax burden in common law and community property states was attempted. It is well known that Congress adopted this provision and the split income provisions in 1948 to stem the increasing efforts of common law states to secure for

their citizens the tax advantages which were available in community property states. S. Rep. No. 1013 (Part 2) p. 22 *et seq.*, 80th Cong., 2nd Sess. (1948-1 C.B. 285, 303).

"The purpose of the marital deduction provision was to extend to spouses in common law states the advantages of married taxpayers in community property states, by permitting the surviving spouse to acquire free of estate tax up to one-half of the decedent's adjusted gross estate, *Dougherty v. United States*, 292 F. 2d 331, 337 (6th Cir. 1961), and to bring about a two-stage payment of estate taxes, *United States v. Stapf*, 375 U.S. 118, 128, 84 S. Ct. 248, 11 L. ed. 2d 195 (1963). * * *" *The Citizens National Bank of Evansville v. United States*, 359 F. 2d 817, 819 (7 Cir. 1966). The "general goal of the marital deduction provisions," stated the Supreme Court in *Jackson v. United States*, 376 U.S. 503, 510, 11 L. ed. 2d 871, 876 (1964), "was to achieve uniformity of federal estate tax impact between those States with community property laws and those without them."

Accordingly, for estate tax purposes, a deduction from the value of the gross estate was allowed in an amount equal to the value of any interest in property passing from the decedent to his surviving spouse, limited, however, so that it should not exceed 50% of the value of the adjusted gross estate. Realizing the existing law under the *Del Drago* decision to be, however, that state law determines whether the marital share is to bear any part of the estate tax, it was provided, "to adhere to the patterns of state law" (*United States v. Stapf, supra*), that, for purposes of valuation of any interest passing to the surviving spouse, there should be taken into account the effect (*if any*) which the Federal estate tax or any estate, succession, legacy or inheritance tax under local law has on the net value to the surviving spouse of such interest. Section 2056(b)(4)(A), 1954 Code (Section

812(e)(1) (E), 1939 Code). This provision does "not say that the tax shall or shall not have an effect on the interest of the surviving spouse, but only that if it does have an effect, it shall be taken into account in determining the value of the marital deduction." Whittaker and Whittaker, *supra* (p. 16), at p. 267. Thus, the "basic policy is to permit, rather than to require, one-half of the decedent's property to pass free of tax if transferred to the surviving spouse." Sugarman, *Estate and Gift Tax Equalization—The Marital Deduction*, 36 Calif. Law Review 223, 229, fn. 30 (1948).

Since a testator uniformly has the power to direct where the impact of such tax shall fall, each citizen was given the right to pass one-half of his estate to his surviving spouse free of estate tax by specifically so providing in his will. As to testacy with no direction with respect to the tax burden or in the case of intestacy, each state *could*, by legislation or by court decision if there were no statute to the contrary, provide for an equitable apportionment of any death duty leaving free therefrom property passing to the surviving spouse. The Congressional policy in its attempt to provide estate tax equalization between community and noncommunity property states is well summed up in *Old Colony Trust Co. v. McGowan*, 163 A. 2d 538 (Me. 1960) that:

"* * * Congress did not provide for this equality with community property states but only made it possible for any state to achieve that equality if it was so minded. * * *"

Did the Congress intend a different result with respect to District of Columbia decedents for whom it also acts as the local legislature? Surely it did not—and it is up to this Court to make the intended provision fully effective by adopting a rule of equitable apportionment applicable to the situation, since the Congress evidently believed that to effect the intended result locally, no statutory provision

for equitable apportionment was required. In the language of *Pitts v. Hamrick*, 228 F. 2d 486, 489 (4 Cir. 1955):

"* * * There is no reason why the apportionment may not be made by the courts of the state [District] in application of what they conceive to be the requirements of the state [District] law in the premises as well as by its legislature. Such was the decision of the courts of Kentucky and Ohio, in apportioning the estate tax so as to relieve the share of the widow from the payment of any part thereof. *Lincoln Bank & Trust Co. v. Huber, Ky.*, 240 S.W. 2d 89; *Miller v. Hammond*, 156 Ohio St. 475, 104 N.E. 2d 9, 18. * * *

See also *Re Gallagher's Will, supra*, and *Seymour National Bank v. Heideman*, 278 N.E. 2d 771 (Ind. 1961).

If the State of "New Jersey would intend its citizens to have the full benefit of the 'geographic equalization' which Congress provided by establishing the marital deduction," (*Dodd v. United States*, 345 F. 2d 715, 718 (3 Cir. 1965)), then surely the Congress would intend that its District of Columbia citizens, for whom it *also* legislates locally, should receive the same full benefit. As further stated in *Pitts v. Hamrick, supra*, (at p. 490):

"* * * Where the estate is to receive the benefit of the deduction of the widow's share from the gross estate in order that that share may be relieved of the burden of the estate tax, as Congress intended, it would be unfair and unjust to require her share to bear any portion of the tax; and we find nothing in the law of South Carolina which requires such a result or which would prevent the court from applying equitable principles of apportionment to relieve the share of the widow of this unfair and unjust burden. * * *

"It is inconceivable here that any part of the estate tax should be attributed to the share of the widow, where the purpose of Congress in allowing the marital deduction was to free the interest of the surviving spouse from the burden of that tax and where the estate receives the benefit of the deduction because of that interest."

See also *Hammond v. Wheeler*, 347 S.W. 2d 884, 893 (Mo. 1961) and *Seymour National Bank v. Heideman*, *supra* (at 777).

Assuming that with respect to a District of Columbia problem "the necessary implications" from the terms of the Federal statute are as controlling as they were asserted to be in 1937 (*Hepburn v. Winthrop*, *supra*), the history of subsections (c) and (d) of section 826, 1939 Code (sections 2206 and 2207, 1954 Code) is of paramount significance. In each of those subsections the Congress, prior to 1948, had originally provided (Senate Rept. No. 1631, 77th Cong., 2nd Sess. (1942-2 C.B. 504, 675)) for "a fair and equitable apportionment of the tax burden attributable" to insurance and appointive property regardless of to whom it went. Only to this extent had the Congress exercised its unquestioned Federal power to determine upon whom fell the burden of the estate tax. With the enactment of the marital deduction provisions in 1948, however, the Congress expressly provided *against* any such apportionment to those assets to the extent that such property qualifies for the marital deduction. It is submitted that such latter action is consistent only with a Congressional intent that to the extent *it* was responsible for any rule of apportionment, it intended to provide *against* liability to the surviving spouse where the marital deduction was involved; and that it could not have intended otherwise generally as to District of Columbia decedents for whom it has the sole legislative responsibility.

Overwhelming Trend to Apportionment

It is stated in a recent annotation, 37 A.L.R. 2d 169, 171 (1954), entitled "Ultimate Burden of Estate Tax in Absence of Statute or Will Provision," that:

"In jurisdictions which have passed upon the question for the first time since 1942 [date of the *Del Drago* decision], it is generally held that the burden of estate taxes must ultimately be borne by every part of the

taxable estate and that every beneficiary must pay a pro-rata share of the tax."

While the issue here presented is unique in that the Congress, with respect to the District of Columbia, legislates not only nationally but also locally, the decided and overwhelming trend toward equitable apportionment in the various states is not without significance. Thus, as indicated by Appendix C hereto, the following twenty-one states have adopted statutory provisions favoring equitable apportionment of the estate tax: Arkansas (1943), California (1943), Connecticut (1945), Delaware (1947), Florida (1949), Louisiana (1960), Maryland (1937), Michigan (1963), Minnesota (1961), Nebraska (1949), Nevada (1965), New Hampshire (1959), New York (1930), North Dakota (1967), Oklahoma (1965), Pennsylvania (1937), South Dakota (1961), Tennessee (1943), Virginia (1946), West Virginia (1959) and Wyoming (1959). In addition, two more states, North Carolina (1953) and Oregon (1963), have adopted apportionment statutes specifically limited to the purpose of freeing from the Federal estate tax the share of a widow electing against the will.

Of these states, the legislatures changed the contrary court-adopted rule previously prevailing in California, Connecticut, Louisiana, Minnesota, New Hampshire, New York, North Carolina, Oklahoma, South Dakota, Tennessee and West Virginia.

The courts of sixteen states, *without* legislative assistance, adopted the general rule of equitable apportionment. These include Arizona, Delaware (subsequent statute), Florida (subsequent statute), Georgia, Indiana, Kentucky, Kansas, Missouri, Montana, New Hampshire (subsequent statute), New Jersey, New Mexico, Ohio, Pennsylvania (subsequent statute) and South Carolina.

Two states, Alabama (1951) and Iowa (1963), have adopted statutes against apportionment of the Federal es-

estate tax absent testamentary direction. Also there remain, unreversed by legislative action, decisions against apportionment in nine states. These include Colorado, Hawaii, Illinois, Massachusetts, Mississippi, Rhode Island, Texas, Washington and Wisconsin. Of these Massachusetts, by statute, provides for apportionment as to nonprobate assets; Rhode Island, by decision, provides the same.

Of the remaining five states, there is neither statute nor decision bearing on the problem in four: Alaska, Idaho, Utah and Vermont. Maine adopted an equitable apportionment statute in 1945, but repealed it two years later. Notwithstanding this, the Court, in *Bragdon Trustee v. Worthley et al.*, 155 Me. 284, 153 A. 2d 627 (1959), adopted the rule as to nonprobate assets.

Thus, it may be said of the fifty states that, by statute or decision, 32 favor the general apportionment of Federal estate tax, 2 provide for the exoneration of widows electing against a will, 2 have adopted statutes against apportionment of the tax, 9, by court decision, have ruled against apportionment, 4 have neither statute nor decision bearing on the question, and 1 (at least) adopts a rule of apportionment as to nonprobate assets.

Further indicative of the overwhelming current trend is the recommendation made in 1958 by the National Conference of Commissioners on Uniform State Laws that a Uniform Estate Tax Apportionment Act be adopted by all of the states.

State Problem of Interpretation

Appellants recognize that notwithstanding the enactment of the marital deduction provision in 1948, the courts in some jurisdictions continue to reject the contention that the renouncing widow's share is to be computed before taxes *but* assert that such is predicated on a reason not here applicable. Thus, in *Wachovia Bank and Trust Co.*

v. *Green*, 235 N.C. 654, 73 S.E. 2d 879 (1953), the North Carolina court considered the question here presented and involving a statute giving the renouncing widow a share of "the surplus of the estate." The Court held that the word "surplus," as adopted by the State Legislature, meant that which remained of the estate after payment of "all expenses of administration and debts including taxes"; stated that the subsequent 1948 Federal statute could not in any way change the meaning of an enactment of the State Legislature; and concluded that whether any change should be made in the manner of distribution to the widow "is a matter for the General Assembly." This decision was followed *In re Uihlein's Will*, 264 Wisc. 362, 59 S.W. 2d 641, 38 A.L.R. 2d 961 (1953) ("one-third part of his net personal esstate") and *Old Colony Trust Co. v. McGowan*, 163 A. 2d 538 (Me. 1960) (share after "charges of settlement"). Cf. *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 101 N.E. 2d 604 (1951) (share "after payment of all just claims") and *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E. 2d 695 (1954) (share in property to "be distributed"). However, predicated as they essentially are upon the inability of the Congress to change, by national legislation, the prior interpretation of an existing state legislative provision, their rationale is not applicable herein.

Rule of Stare Decisis

It is also true that, notwithstanding the *Del Drago* decision, some of those jurisdictions which had adopted the former majority rule "have retained the rule because of the principle of stare decisis." Annotation, 37 A.L.R. 2d 169, 179. But the doctrine of stare decisis is not one to be rigidly applied or blindly followed. So used the doctrine would nullify the basic principle of the common law which permits it to grow and develop to meet new and changing social conditions and would soon render the law

* The "General Assembly" immediately acted. See Appendix C as to North Carolina.

inelastic, archaic and useless to serve the needs of a dynamic community. *Amoskeag Trust Company et al. v. Dartmouth College, supra* (117 A.L.R. 1186, 1189). While the doctrine should not be applied so sparingly as to destroy the usefulness of judicial decisions as precedents, neither should it be used so freely as to render inviolable a prior decision of this Court previously rendered under a misconception of a Federal statute. It "is not a doctrine of mortmain". *McKenna v. Austin*, 134 F. 2d 659, 666 (C.A.D.C. 1949).

In view of the foregoing, it is submitted that, absent a local applicable statute providing to the contrary, the surviving spouse, in the case of intestacy or election against the will of a testate decedent, should take his or her statutory share free of any estate tax.

- (b) **No local statutory provision prevents a widow of an intestate decedent, or one renouncing under a will, from taking free of any estate tax burden her share of the "surplus" so long as her share otherwise qualifies for the Federal estate tax marital deduction.**

The provisions of the local Code with which the Court must concern itself are:

Section 49-301: "The common law, * * * the principles of equity and admiralty, * * * shall remain in force except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress."

Section 18-211: "* * * (e) By renouncing all claim to any and all devises and bequests made to her * * * by the will of her husband * * * the surviving spouse shall be entitled to such share or interest in the real and personal estate of the deceased spouse * * * which she * * * would have taken had the deceased spouse died intestate, except that in neither event shall the surviving spouse be entitled to more than one-half of the net estate bequeathed and devised by said will, * * *."

Section 18-701: "When the debts of an intestate, exhibited and proved or notified and not barred, shall have been discharged or settled, or allowed to be retained for as herein directed, the administrator shall proceed to make distribution of the surplus as provided for in this chapter."

Section 18-703: "If there be a widow * * * and a child or children, or a descendant or descendants from a child, the widow * * * shall have one-third only."

Whether a spouse electing against the will shall take "one-third" of the "surplus" free of any estate tax liability will depend upon the meaning which is *currently* to be attributed to the term "surplus". As to its *original* meaning, there can be little, if any, doubt.

"Original" Meaning of "Surplus"

As originally enacted in 1901 (31 Stat. 1189-1436) the Congress, in dealing with the administration of District of Columbia estates, provided, under chapter 854 (sections 364 and 365*), for an accounting by every executor and administrator. More specifically, it was provided that "[I]n such account shall be stated, on the one side, the assets which have come to his hands" while "[O]n the other side shall be stated the disbursements by him made, namely: First. Funeral Expenses * * *. Second. The debts of the deceased * * *. Third. The allowance for things lost * * *. Fourth. His commissions * * *. Fifth. His allowance for costs, attorney's fees and extraordinary expenses which the Court may think proper to allow." That the excess of the "asset" side over the "other side" constituted the "surplus," referred to in chapter 854 (section 373** *et seq.*), is reasonably clear.

That in the determination of the "surplus" *no deduction was to be made for death taxes* is also clear and

* Present Code sections 20-604 and 20-605.

** Present Code section 18-701.

the reason therefor is evident. At the time of the enactment of that Code (1901), there existed no federal or District estate tax. While the Spanish War Revenue Bill of 1898 (30 Stat. 448, 464-466) provided for a Federal graduated inheritance tax on transfers of personal property, such tax was imposed upon each individual legatee or beneficiary and express provision was made (section 29, Fifth) that "all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed [of property], as aforesaid, shall be exempt from tax or duty." It is evident, therefore, that in providing for the widow's share in the "surplus" of an intestate estate in the District of Columbia, Congress legislated in 1901 with the view in mind that her share would bear *no* death duty*—and that the amount of the "surplus" was to be determined *before* any death tax.

Meaning of "Surplus" 1916-1948

With the enactment of the Federal Estate Tax Act in 1916 (39 Stat. 777), however, it is evident that the Office of the Register of Wills and the local District Court (holding probate) were faced with at least an illusory problem in the case of intestacy since some provision had to be made for the collection of the newly-enacted tax levy. Three approaches *could* have been made, either of which would have reached the same result.

Under the first approach, all parts of an intestate estate *then* having been subjected to the tax, it is possible that the original meaning of the word "surplus" was retained. Under this approach, the surplus having been divided as provided for by local statute, the Federal estate tax was *then* set off against each share *before* distribution and in the proportion that each share contributed to the tax.

* Cf. *Merchants National Bank & Trust Company of Indianapolis v. United States*, 246 F. 2d 410, 414 (Fn. 8) (7 Cir. 1957).

Such would have been in keeping with the general rule of statutory construction that a statute is to be construed as it was intended to be understood when passed. *United States v. Stewart*, 311 U.S. 60, 69 (1940).

Under the second approach, it is possible that the situation was met by considering the meaning of the word "surplus" to have been modified in order to meet the estate tax requirement—i.e., that "surplus" thereafter meant an amount determined *after* the tax. Such approach *could* have been made by giving effect to section 1639 of the District of Columbia Code, enacted March 30, 1901, effective from and after January 1, 1902 (31 Stat. 1189, 1436), today contained as a note to section 49-304, District of Columbia Code (1961 Edition). That section reads in part as follows:

"* * * all acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment of this code, and, so far as such acts may vary from or conflict with any provision contained in this code, they are to have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith."

By reason of the so-called "necessary implications" (*Hepburn v. Winthrop, supra*), from the 1916 Act provision (i.e., that the tax was to be paid by the administrator), it is possible that the local authorities construed the 1916 Act as giving rise to an inconsistency in the meaning of the word "surplus" as originally enacted with the result, under the foregoing provision of the District of Columbia Code, that such term was considered to have been modified to require the tax to be considered in its determination. Cf. *First National Bank of Colorado Springs, Colorado v. United States*, 30 F. Supp. 730, 731 (D.C. D.C. 1939). Thus, as stated in *Broden v. Bowles*, 35 F.R.D. 1316 (D.C. D.C. 1964), citing *Jordan v. United States*, 93 U.S.

App. D.C. 65, 207 F. 2d 28 (C.A. D.C. 1953) in support thereof:

"When a later statute of general application is inconsistent with an earlier statute only locally applicable, the earlier statute is repealed to the extent that it is inconsistent."

As to the third possible approach, it is the rule that the meaning of a statute may change with the times (*Pirkey Bros. v. Virginia*, 134 Va. 713, 114 S.E. 764, 29 A.L.R. 1290, 1294 (1922)) and that a statute may be applied to facts and situations unknown and not contemplated by the legislature at the time of its enactment. *Delany v. Moraitis*, 136 F. 2d 129, 132 (4 Cir. 1943). Thus, in the *Pirkey Bros.* decision, the Court stated that:

"We cannot, however, agree with the few courts that hold that the word 'necessity' must be construed to mean the same thing now as it did when the original act was passed in 1779. * * * The word is elastic and relative, and must be construed with reference to the conditions under which we live, * * *."

The *Delany* decision states that:

"* * * We realize, of course, that the existing situation was not actually in the mind of Congress when the statute was passed; but statutory interpretation is concerned in determining not alone what situations were actually in the mind of Congress but also the intent and meaning of the language used when applied to situations that were not foreseen at the time. Many statutes must necessarily be couched, as this one was, in general terms. They must be enforced frequently in situations that could not have been foreseen by the lawmakers; and it is the duty of the courts to give them, if possible, an interpretation that will render them workable and avoid unjust and harsh results. * * *"

See also *Commonwealth v. Tilley*, 306 Mass. 412, 28 N.E. 2d 245, 129 A.L.R. 381, 385 (1940); *Remick & Co. v.*

American Automobile Accessories Company, 5 F. 2d 411, 40 A.L.R. 1511 (6 Cir. 1925); *Cain v. Bowlby*, 114 F. 2d 513, 522 (10 Cir. 1940); and *White v. District of Columbia*, 4 F. 2d 163, 164 (C.A.D.C. 1925).

Thus, following the third approach, in reaching a decision after 1916 as to whether the term "surplus" was to be determined before or after the impact of the Federal estate tax, the fact that Congress in 1901 did not have before it the 1916 legislation was "not enough." *Puerto Rico v. Shell Company*, 302 U.S. 253, 257 (1937). To paraphrase the language of that Court, it would have been necessary, in order to determine that the tax was *not* to be considered in its determination, to go further and say that if the 1916 tax imposition had been foreseen in 1901, Congress would have so varied its language as to exclude the tax as a factor in determining the "surplus". Thus, the 1916 Estate Tax Law having made a new exaction which necessarily had to be provided for, the meaning of the term "surplus" on one of the two latter approaches, could have been modified, to the extent of its then resulting inconsistency, by treating the estate tax as being in the nature of an administration expense since (*Bigoness v. Anderson et al.*, 106 F. Supp. 986 (D.C.D.C. 1952)) it obviously was not a debt of the decedent.

Meaning of "Surplus" 1948 to Date

If, as the result of the Federal Estate Tax Act of 1916, the meaning of the word "surplus" was considered *not* to have been changed from that with which it was originally enacted, then there exists today no reason to change it, and the surviving spouse's share therein is to be determined before any estate tax. If, however, as the result of the 1916 Act, the meaning of the term *was* changed to avoid an inconsistency with the subsequent general legislation, then there is every reason to again apply a changed meaning to conform with the intent, the

purpose and the "necessary" implications of the Federal estate tax law subsequently enacted by the Congress in 1948 (62 Stat. 111, 116).

To be emphasized is the statement of the court in *Jackson v. United States, supra* (at p. 510) that:

"* * * the general goal of the marital deduction provision was to achieve uniformity of federal estate tax impact between those states with community property laws and those without them."

While the device of the marital deduction which Congress chose to achieve that uniformity was purposely hedged with limitations, including that contained in subsection (b)(4)(A) of section 2056, the latter was but a recognition of the right of each state (*Riggs v. Del Drago, supra*) to determine the ultimate thrust of the tax. Having thus continued to recognize in the states the right to determine where the burden of the Federal estate tax should lie, it would seem that the Congress, with the enactment of the marital deduction provision, implicitly *expected* that each common law state would determine, *either* by legislation *or* by judicial decision, that the full benefit of the marital deduction would be accorded where applicable to the surviving spouse—the result to be achieved by recognizing that the surviving spouse's share which qualifies for the marital deduction creates no tax liability for the estate.

The Congress having adopted no legislation for the District of Columbia specifically dealing with the apportionment of the tax, one may conjecture in either of two ways: first, that the Congress intended that the estates of intestate District of Columbia decedents were *not* to receive the full benefit of the marital deduction provision, or second, that Congress *intended the contrary* and implicitly *expected* the District of Columbia courts to determine, by judicial decision, that the full benefit of the

marital deduction would be accorded to the surviving spouse. The first alternative cannot be accepted since it is squarely contrary to the basic concept of the 1948 legislation and to the inferences necessarily to be drawn in aid of its intent and purpose. *Cf. Hepburn v. Winthrop, supra.* Thus, the only question remaining is whether, in the case of intestacy, the District of Columbia courts are prevented from reaching the desired result because of the statutory term "surplus", adopted in 1901, the potential elasticity in the meaning of which is demonstrated above.

In this respect, as stated by Kahn, *The Federal Estate Tax Burden Borne By a Dissenting Widow*,* 64 Michigan Law Review 1499, 1522 (1966):

"* * * the courts should not seek to resolve the question of the estate tax burden on the widow's share solely by reference to the technical definition of the words employed in the state statute defining that share, particularly where the statute was enacted prior to the adoption of the marital deduction provision in 1948."

Professor Kahn further states (p. 1502) that:

"* * * the dispositive issue is not merely a designation of the literal meaning of the statutory language; rather, there must be a determination of the legislative policy underlying the statute and of the question whether the deduction of federal estate taxes furthers or frustrates that policy."

Apropos thereto is the unquestioned principle that the Congress has the sole power to decide what the policy of the District of Columbia law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed by the courts. *Cf. Minnesota Mining*

* This treatise, limited as it is to the specific issue here involved, is commended to the Court, in its entirety, for consideration.

& Manufacturing Co. v. North Jersey Wood Finishing Co., 381 U.S. 311, 321 (1965). In the language of that Court (p. 321):

“* * * it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it [as to the District of Columbia], and therefore we shall go on as before.”

This Court, therefore, should determine that the widow's share in an intestate estate will be one-third *before* any estate tax either (1) on the basis that the term “surplus” retains the meaning with which it was originally enacted, *i.e.*, an amount determined before any death tax, or (2) on the basis that had Congress in 1901 had before it the marital deduction provision, it would have expressly so provided (*cf. Puerto Rico v. Shell Company, supra*), or (3) on the basis that the 1948 legislation of general application is so inconsistent with the previously changed meaning of the existing local “surplus” statute, that it must have been intended that the latter again be modified to the extent of such inconsistency.

Such Construction Is the Desirable One

Evidencing the desirability of such a statutory construction is the Report of the Committee on the District of Columbia (H. Rept. No. 679, 87th Cong., 1st Sess., p. 2) with respect to H. R. 7265, a bill “to amend the code of law for the District of Columbia so as to provide a new basis for determining certain marital property rights”. There, referring to the fact that the “number of persons with property interests in both the District of Columbia and Maryland is constantly increasing,” the Committee states that “it is believed desirable that, so far as possible, marital property rights in the two jurisdictions should be similar so that such persons planning the disposition of their estate or acquiring property will not be faced with conflicting laws.” If this be true, does not

the same reasoning make it clearly desirable, to avoid conflict of laws problems, that apportionment of the estate tax should *also* be in line with the law of Maryland (and Virginia) which provides for full exoneration of property passing to a surviving spouse which qualifies for the marital deduction. See Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 Columbia Law Review 261, 267 (1955).

Even further supporting the desirability of a statutory construction favoring the wife are the zealous efforts of the District of Columbia courts to protect the widow in other respects. This Court has stated that it "has declared the long-established policy of the law to be the protection of the wife and the securing to her of a reasonable portion of her husband's estate." *Jordan v. American Security & Trust Company*, 38 App. D.C. 391, 394 (1912); *Mead v. Phillips*, 135 F. 2d 819, 824 (1943). Thus, in the latter decision the Court, in order to protect the interests of a surviving spouse, refused to apply the literal language of the statute dealing with the widow's right of election. Still further the statutory provision for widows in the District "constitutes a recognition and, in part, a restatement of her rights at common law" (*Mead v. Phillips*, *supra*, at 825) and it is axiomatic that "the common law is not immutable but flexible and by its own principles adapts itself to varying conditions." *Manoukian v. Tomasian*, 237 F. 2d 211, 215 (C.A.D.C. 1956).

CONCLUSION

In conclusion, it is submitted (1) that any rule against the equitable apportionment of estate tax which may be said to exist in the District of Columbia is predicated upon an erroneous basis; (2) that the rule favoring apportionment is the fair and equitable one; (3) that the overwhelming trend has been to the adoption of that rule; (4) that the legislative history of, and any inference to be drawn from, the marital deduction provisions indicates that

Congress intended the widow's statutory share of the estate of a District of Columbia decedent, to the extent that it does not exceed 50% of the estate, to be exonerated from any estate tax liability; (5) that by such general statutory provision, any prior statute of local application, to the extent inconsistent, was modified; (6) that if the latter proposition is invalid, nevertheless the word "surplus" is readily susceptible of appropriate interpretation to the desired end; and (7) that should the local courts fail to effect such exoneration, the purpose of the Congress will be thwarted.

Respectfully submitted,

HARRY L. BROWN

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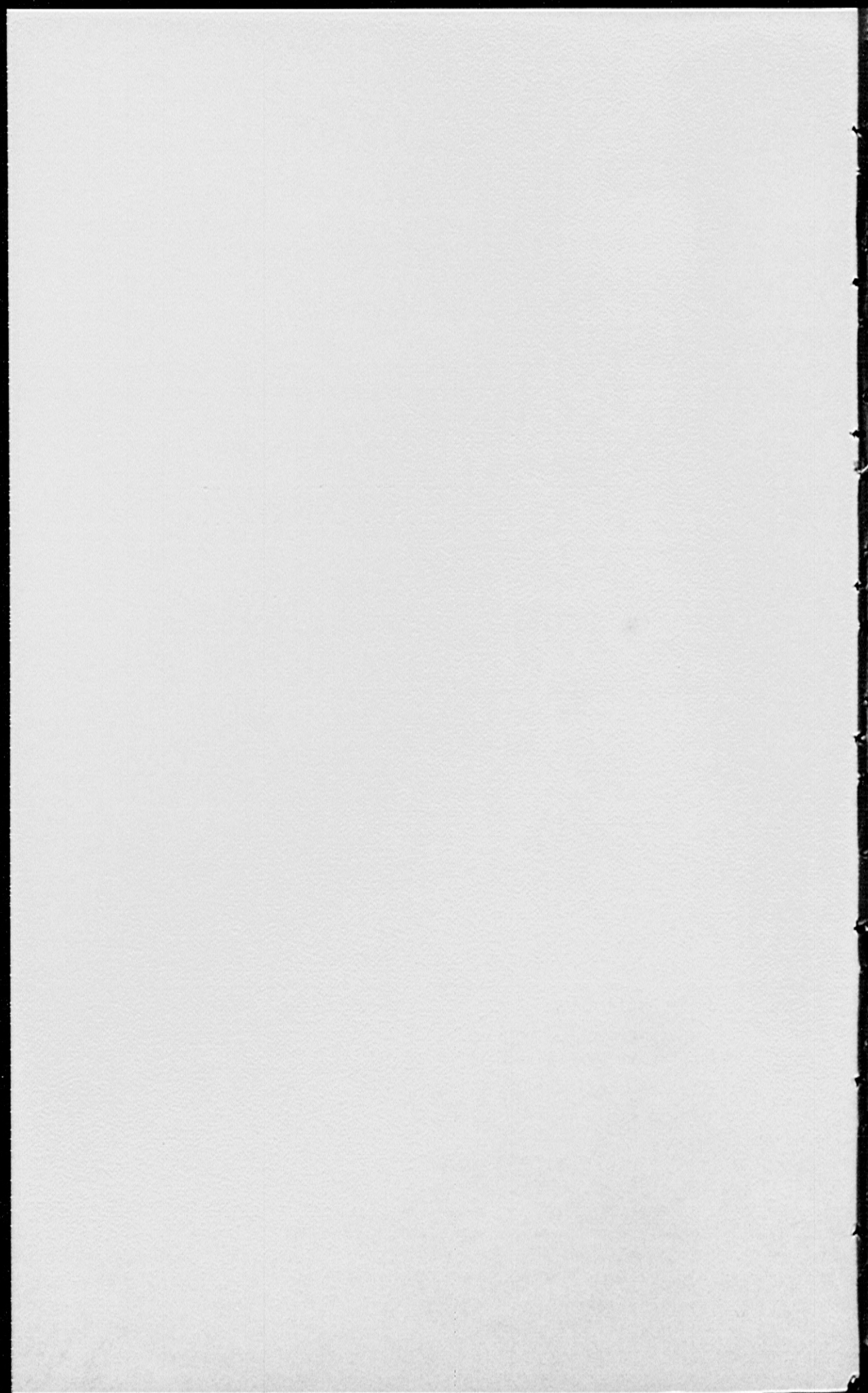
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**APPENDIX A—DOCKET ENTRIES, PLEADINGS
AND JUDGMENT APPEALED FROM**

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1966

Oct. 3 Complaint, appearance filed

Oct. 3 Summons, copies (2) and copies (2) of Complaint issued

Dec. 6 Motion of plaintiffs for summary judgment; statement; exhibit A with exhibits 1 thru 7; exhibit B with exhibits 1 and 2; memorandum; ser. ack. 12/6/66; M.C. 12/6/66. filed

Dec. 7 Summons, copies (2) and copies (2) of complaint issued. Deft. ser. 12-8-66 Atty. Gen. ser. 12-19-66

1967

Jan. 11 Stipulation of counsel extending time for deft. to respond to motion for summary judgment to and including 2-15-67. filed

Feb. 8 Cross-motion of deft. to dismiss for lack of jurisdiction; memorandum; P&A; c/m 2-2; M.C. 2-8. filed

Feb. 9 Withdrawal of deft.'s cross-motion to dismiss per counsel. filed

Feb. 16 Opposition of deft. to plttf.'s motion for summary judgment; cross-motion for summary judgment; statement; P&A; c/m 2-15; appearance of Mitchell Rogovin, Stanley F. Krysa and Joseph H. Thibodeau. filed

Feb. 20 Opposition of plttf. to cross-motion of deft.; c/m 2-20. filed

- Feb. 20 Answer of deft. to complaint; c/m 2-16; appearance of Mitchell Rogovin, Myron C. Baum and Joseph H. Thibodeau. filed
- Feb. 20 Calendared (N) AC/N.
- Mar. 7 Order denying and overruling plttfs.' motion for summary judgment; granting deft.'s motion for summary judgment and dismissing action with prejudice. (N) Matthews, J.
- Mar. 9 Transcript of proceedings 3-1-67. (Rep.: J. Blair—Court's copy) filed
- Mar. 20 Transcript of proceedings 3-3-67; Part I. (Rep. J. Blair— Court's copy) filed
- May 2 Notice of appeal by plttfs. from order of 3-7-67; copy mailed to Joseph H. Thibodeau. Deposit by Brown \$5.00 filed
- May 3 Order granting plttfs leave to deposit \$250.00, with Clerk, by bank cashier's checks, in lieu to bond for costs on appeal. (N) Jones, J.
- May 4 Deposit of \$250.00 by plttfs. into the Court in lieu of appeal bond per order of 5-3-67.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action, File No. 2603—'66

Complaint

(For Refund of Federal Estate Tax)

ROLAND H. DEL MAR (address: The Harbour Square Apartments, Apt. No. S231, 500 N. Street, S. W., Washington, D. C.) and THE RIGGS NATIONAL BANK OF WASHINGTON, D. C. (address: 800 17th Street, N. W., Washington, D. C. 20013), as Executors of the ESTATE OF CHARLES DELMAR, Deceased, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

1. This is a suit of a civil nature arising under the laws of the United States, including the laws providing for Internal Revenue, and including particularly the provisions of Title 28, United States Code section 1346(a)(1), as amended (28 U.S.C.A. section 1346(a)(1)).

2. Plaintiffs, Roland H. del Mar and The Riggs National Bank of Washington, D. C., are executors of the Last Will and Testament of Charles Delmar, Deceased. The Riggs National Bank of Washington, D. C. is a banking corporation organized and existing under the Federal Banking Laws with full authority to act as executor of wills and in other trust capacities.

3. Charles Delmar died August 17, 1963 a resident of Washington, District of Columbia, leaving a Last Will and Testament which was duly admitted to probate in the United States District Court for the District of Columbia, holding a probate court, to which jurisdiction in that behalf belonged. On September 11, 1963, letters testamentary were duly issued out of that Court to Ellsworth C. Alvord and The Riggs National Bank of Washington, D. C. who duly qualified as executors of said Last Will and Testa-

ment. On January 20, 1964, letters testamentary were duly issued out of that Court to Roland H. del Mar as substitute executor in the place and stead of Ellsworth C. Alvord, deceased, and Roland H. del Mar duly qualified as an executor of the said Last Will and Testament. Since January 20, 1964, Roland H. del Mar and The Riggs National Bank of Washington, D. C. have been and still are duly qualified and acting as such executors.

4. Within six months after the will of the decedent was admitted to probate and on November 1, 1963, the surviving spouse, Jacqueline Delmar, acting under Section 18-211, Title 18, of the District of Columbia Code (1961 edition), filed with the Probate Court a written renunciation renouncing all claims to any and all devises and bequests made to her under the will and electing to receive her legal share of the real and personal property of the estate. At the time of the decedent's death, he owned real estate located in the State of Maryland. The surviving spouse also renounced the decedent's will in the ancillary administration effected in that State for the distribution of said real estate.

5. The plaintiffs have a just claim against the defendant for the sum of \$355,942.82, or such greater sum as results from the decision of the Court herein, together with interest as provided by law, which said sum was paid by the said executors of the Estate of Charles Delmar, Deceased, to the defendant through the duly appointed, qualified and acting District Director of Internal Revenue for the District of Maryland, as hereinafter set forth.

6. Within the time allowed by law, to wit, on November 16, 1964, plaintiffs filed with the said District Director of Internal Revenue a final estate tax return covering the Federal estate taxes assessable against the Estate of Charles Delmar, having previously filed the preliminary return required by law, and, on that date, paid the estate

tax liability shown on the final return in the amount of \$1,969,231.36.

7. In said Federal estate tax return filed, the amount of the marital deduction claimed (\$1,725,725.58) was determined on the theory that the widow's share, though less than one-half of the adjusted gross estate, was subject to and must be reduced by a part of the Federal and District of Columbia estate tax. On the same theory, the office of the said District Director of Internal Revenue, in making the adjustments hereinafter referred to in paragraph 9, fixed the amount of the allowable marital deduction at \$1,726,620.96.

8. On June 24, 1965, plaintiffs, by mail, duly filed with the said District Director of Internal Revenue a claim for refund dated June 24, 1965 on the basis that the amount otherwise constituting the allowable marital deduction under Title 26, United States Code section 2056, as amended (26 U.S.C.A. section 2056), should not be reduced by either of such taxes.

9. Thereafter, the examining agent, reviewing said final return, made adjustments increasing the reported value of certain assets and reducing certain deductions claimed for administration expenses, none of which are in controversy herein, refused to otherwise increase the amount of the allowable marital deduction, as claimed, and determined that a deficiency existed in the amount of \$7,015.29, together with statutory interest thereon from the final date on which said tax return was due amounting to \$701.53, and the aggregate amount of \$7,716.82 was paid to the said District Director of Internal Revenue on August 25, 1966 covering this requirement. Also by nonregistered letter dated February 4, 1966 the said District Director tentatively proposed for disallowance plaintiffs' claim for refund.

10. This Complaint is filed before the expiration of two (2) years from the date of mailing of the said tentative notice of disallowance.

11. Based upon the grounds set forth in said claim for refund and the facts therein reflected, all of which are incorporated herein by reference, plaintiffs overpaid the Federal estate tax due in the amount of \$355,942.82, or such greater sum as should result from an appropriate decision of this Court.

12. The repayment of the amount of the claimed refund has been demanded but no part of said sum has been credited, remitted, refunded or repaid in any manner to the plaintiffs; and the full amount thereof, together with interest thereon, remains due and owing from the defendant to the plaintiffs.

WHEREFORE, plaintiffs demand judgment against defendant in the principal amount of \$355,942.82, or such greater sum as results from the decision of the Court herein, together with interest thereon as provided by law, from the dates of payment thereof, and all costs of this proceeding.

/s/ HARRY L. BROWN

Harry L. Brown

Counsel for Plaintiffs

200 World Center Building

Washington, D. C. 20006

Of Counsel:

ALVORD AND ALVORD

200 World Center Building

Washington, D. C. 20006

BRACKLEY SHAW, Esquire

SHAW, PITTMAN, POTTS, TROWBRIDGE & MADDEN

910 17th Street, N. W.

Washington, D. C. 20006

District of Columbia) ss.

Roland H. del Mar, being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that he verily believes the facts stated in the Complaint to be true.

/s/ ROLAND H. DEL MAR
Roland H. del Mar

Subscribed and sworn to before me this 27th day of September, 1966.

/s/ FRANCES B. HALL
Notary Public

My Commission Expires Feb. 14, 1970

District of Columbia) ss.

Edwin B. Shaw, being first duly sworn, deposes and says: I am a Vice President of The Riggs National Bank of Washington, D. C., one of the plaintiffs in the above-entitled action; I make this affidavit in behalf of that corporation; I have read the foregoing Complaint and know the contents thereof, and I verily believe the facts stated in the Complaint to be true.

/s/ EDWIN B. SHAW
Edwin B. Shaw

Subscribed and sworn to before me this 20th day of September, 1966.

/s/ ELIZABETH S. WILLIAMSON
Notary Public

My Commission Expires Feb. 28, 1968

[HEADING OMITTED]

Answer

The defendant, the United States of America, by its attorney, David G. Bress, Esquire, United States Attorney for the District of Columbia, for its answer to the complaint herein alleges as follows:

1. Admits the allegations contained in paragraph 1.
2. Admits the allegations contained in paragraph 2.
3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3.
4. Admits the allegations contained in the first sentence of paragraph 4. Denies knowledge or information sufficient to form a belief as to the truth of all other allegations contained in paragraph 4.
5. Admits the allegations contained in paragraph 5, except denies that plaintiffs have any just claim against the defendant for any amount.
6. Admits the allegations contained in paragraph 6.
7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7, except alleges that the District Director's determination speaks for itself.
8. Admits the allegations contained in paragraph 8, except denies each and every allegation contained in plaintiff's claim for refund.
9. Admits the allegations contained in paragraph 9.
10. Admits the allegations contained in paragraph 10.
11. Denies the allegations contained in paragraph 11.
12. Admits the allegations contained in paragraph 12, except denies that any amount remains due and owing from defendant to the plaintiffs.

WHEREFORE, defendant prays that judgment be entered in its favor, dismissing plaintiffs' complaint, allowing defendant its costs and such other and further relief as this Court may deem just and proper.

MITCHELL ROGOVIN
 Mitchell Rogovin
*Assistant United States
 Attorney General*

MYRON C. BAUM
 Myron C. Baum
*Chief, Refund Trial
 Section No. 2*

JOSEPH H. THIBODEAU
 Joseph H. Thibodeau
*Attorneys, Tax Division
 Department of Justice
 Washington, D. C. 20530
 Attorneys for Defendant*

Of Counsel:

/s/ DAVID G. BRESS
 David G. Bress
United States Attorney

[HEADING OMITTED]

Motion for Summary Judgment

Plaintiffs, as executors of the Estate of Charles Delmar, Deceased, by their attorney, hereby move the Court to enter summary judgment for the plaintiffs in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, determinative of the issue whether the surviving spouse of a District of Columbia decedent, having filed a written renunciation under Section 18-211, Title 18, of the District of Columbia Code (1961), takes her

statutory share of the estate free of any Federal or District of Columbia estate tax.

In support hereof, plaintiffs rely upon the pleadings herein, the affidavit hereto attached and marked Exhibit A, Exhibits 1, 2, 3, 4, 5, 6 and 7 attached thereto, and the affidavit hereto attached and marked Exhibit B, Exhibits 1 and 2 attached thereto, all of which show that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

Plaintiffs further request that the Court, in entering its Order pursuant to this Motion, state therein, pursuant to 28 U.S.C.A. section 1292(b), that the Order involves the controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order will materially advance the ultimate termination of the litigation.

Respectfully submitted,

/s/ HARRY L. BROWN

Harry L. Brown

Counsel for Plaintiffs

200 World Center Building
Washington, D. C. 20006

Of Counsel:

ALVORD AND ALVORD

200 World Center Building
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910 17th Street, N. W.
Washington, D. C. 20006

[HEADING OMITTED]

Defendant's Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9 of the rules of this Court, the defendant, the United States of America, respectfully opposes plaintiffs' motion for summary judgment and submits that it should be denied for the reasons set forth in its memorandum of points and authorities filed herewith.

Defendant further moves the Court to grant summary judgment in its favor on the grounds that there is no dispute as to any material fact involved in this controversy, and that the defendant is entitled to judgment as a matter of law.

In support of its cross-motion for summary judgment, the defendant relies on its statement of material facts as to which there is no genuine issue and the memorandum of points and authorities in support of its motion, both of which are filed herewith.

MITCHELL ROGOVIN
Mitchell Rogovin
Assistant Attorney General

STANLEY F. KRYSA
Stanley F. Krysa
*Acting Chief, Refund Trial
Section No. 2*

JOSEPH H. THIBODEAU
Joseph H. Thibodeau
Attorney
Tax Division
Department of Justice
Washington, D. C. 20530

Of Counsel:

Attorneys for Defendant

.....
DAVID G. BRESS
United States Attorney

[HEADING OMITTED]

Order and Judgment

The Court, having carefully considered the respective motions for summary judgment filed on behalf of each of the parties hereto, together with the briefs, pleadings, and oral arguments of counsel relating thereto, being of the opinion that the plaintiffs' motion should be overruled and that the defendant's motion should be granted, it is accordingly

ORDERED, ADJUDGED and DECREED by the Court that the plaintiffs' motion for summary judgment be and the same is hereby overruled and denied.

It is further ORDERED, ADJUDGED and DECREED by the Court that the defendant's motion for summary judgment be and the same hereby is granted and that this action is hereby dismissed with prejudice.

DONE this — day of —, 1967.

.....
United States District Judge

APPENDIX B—STATUTES INVOLVED

Internal Revenue Code of 1954

(68A Stat. 3, 392, *et seq.*)

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) Allowance Of Marital Deduction.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) Limitation In The Case Of Life Estate Or Other Terminable Interest.—

* * *

(4) Valuation Of Interest Passing To Surviving Spouse.—In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

* * *

(c) Limitation On Aggregate Of Deductions.—

(1) General Rule.—The aggregate amount of the deductions allowed under this section * * * shall not exceed 50 percent of the value of the adjusted gross estate, * * *.

SEC. 2205. REIMBURSEMENT OUT OF ESTATE.

If the tax or any part thereof is paid by, or collected out of, that part of the estate passing to or in the possession of any person other than the executor in his capacity as

such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

SEC. 2206. LIABILITY OF LIFE INSURANCE BENEFICIARIES.

Unless the decedent directs otherwise in his will, if any part of the gross estate on which tax has been paid consists of proceeds of policies of insurance on the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the sum of the taxable estate and the amount of the exemption allowed in computing the taxable estate, determined under section 2051. If there is more than one such beneficiary, the executor shall be entitled to recover from such beneficiaries in the same ratio. In the case of such proceeds receivable by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such proceeds except as to the amount thereof in excess of the aggregate amount of the marital deductions allowed under such section.

SEC. 2207. LIABILITY OF RECIPIENT OF PROPERTY OVER WHICH DECEDENT HAD POWER OF APPOINTMENT.

Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross

estate under section 2041, the executor shall be entitled to recover from the person receiving such property by reason of the exercise, nonexercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the sum of the taxable estate and the amount of the exemption allowed in computing the taxable estate, determined under section 2052, or section 2106(a), as the case may be. If there is more than one such person, the executor shall be entitled to recover from such persons in the same ratio. In the case of such property received by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such property except as to the value thereof reduced by an amount equal to the excess of the aggregate amount of the marital deductions allowed under section 2056 over the amount of proceeds of insurance upon the life of the decedent receivable by the surviving spouse for which proceeds a marital deduction is allowed under such section.

* * *

District of Columbia Code
(1961 Edition)

SEC. 18-211. Renunciation of devises and bequests to spouse—Election of dower—Time limitations—Renunciations or elections by guardians or fiduciaries—Renunciations deemed to have been made when nothing passes under bequest or device—Maximum rights upon renunciation—Antenuptial or postnuptial agreements.

* * *

(e) By renouncing all claim to any and all devises and bequests made to her * * * by the will of her husband * * * the surviving spouse shall be entitled to such share or interest in the real and personal estate of the deceased spouse * * * which she * * * would have taken had the deceased spouse died intestate, except that in neither event shall the

surviving spouse be entitled to more than one-half of the net estate bequeathed and devised by said will, * * *.

* * *

SEC. 18-701. Distribution—When to be made.

When the debts of an intestate, exhibited and proved or notified and not barred, shall have been discharged or settled, or allowed to be retained for as herein directed, the administrator shall proceed to make distribution of the surplus as provided for in this chapter.

* * *

SEC. 18-703. When surviving spouse entitled to one-third.

If there be a widow * * * and a child or children, or a descendant or descendants from a child, the widow * * * shall have one-third only.

* * *

SEC. 49-301. Common law, principles of equity and admiralty, and Acts of Congress to remain in force.

The common law, * * * the principles of equity and admiralty, * * * shall remain in force except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress.

* * *

SEC. 49-304. Repeal and savings provisions of 1901 Code.

Sections 1636 to 1643 of act Mar. 3, 1901, 31 Stat. 1434, ch. 854, provided that:

* * *

“Sec. 1639. The enactment of this code is not to affect or repeal any act of Congress which may be passed between the date of this act and the date when this act is to go into effect; and all acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment of this code, and, so far as such acts may vary from or conflict with any provision contained in this code, they are to have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith.”

**APPENDIX C—APPORTIONMENT STATUTES
AND DECISIONS**

Alabama

Ala. Code Tit. 51, sec. 449 (adopted 1951) prohibits apportionment of the Federal estate tax absent testamentary direction.

Alaska

No statute or decision.

Arizona

No apportionment statute. Wife's marital deduction share free of tax on application of equitable apportionment rule. *Doetsch v. Doetsch*, 312 F. 2d 323 (7 Cir. 1963).

See also Opinion of the (State) Attorney General, March 3, 1967, CCH Inheritance, Estate and Gift Tax Reporter, State, Current ¶ 20,047.

Arkansas

Apportionment statute. Ark. Stat. Ann. sec. 63-150 (adopted 1943). Statute held not to exempt marital deduction share. *Williamson v. Williamson*, 224 Ark. 141, 272 S.W. 2d 72 (1954). Statute amended in 1955 retroactive to 1948 to exempt wife's share to the extent that it qualifies for the marital deduction. (Acts 1955, No. 122, sec. 1, p. 292.)

California

Apportionment statute. Calif. Probate Code Ann. sec. 970 et seq. (adopted in 1943) exempts marital deduction share. *In Re Buckhantz' Estate*, 120 Calif. A. 2d 92, 260 P. 2d 794 (1953).

Prior thereto courts had adopted the rule against apportionment. *Rogan v. Taylor*, 136 F. 2d 598 (9 Cir. 1943).

Colorado

No apportionment statute. *Ramsey v. Nordloh*, 354 P. 2d 513 (1960) adopts rule against equitable apportionment.

Connecticut

Apportionment statute. Conn. Gen. Stat. Ann. sec. 12-400 et seq. (adopted 1945). Marital deduction allowance exonerated from tax. *Jerome v. Jerome*, 139 Conn. 285, 93 A. 2d 139 (1952).

Prior to the statutory enactment, the rule was against apportionment. *Ericson v. Childs*, 124 Conn. 66, 198 A. 176, 115 A.L.R. 907 (1938).

Delaware

Apportionment statute. Dela. Code Ann. Tit. 12, sec. 2901 et seq. (adopted 1947). *Wilmington Trust Co. v. Copeland*, 94 A. 2d 703 (1953) states that statute merely restated prior common law.

Florida

Apportionment statute. Fla. Stat. Ann., Vol. 21, sec. 734.041 (adopted 1949). Common law also provided for apportionment and renouncing widow's share was free of tax. *In Re Fuch's Estate*, 60 So. 2d 536 (1952).

Georgia

No apportionment statute. Common law rule of equitable apportionment applies. *Regents of University of Georgia v. Trust Company of Georgia*, 194 Ga. 255, 21 S.E. 2d 691 (1942) and *In Re Comer's Trust*, 101 N.Y.S. 2d 916 (1950) (stating Georgia rule).

Hawaii

No apportionment statute. Rule against apportionment applied. *In Re Glover's Estate*, 371 P. 2d 361 (1962). (A 3-2 decision.)

Idaho

No apportionment statute and no decisions.

Illinois

No apportionment statute. In *Wilson v. Northern Trust Co.*, 101 N.E. 2d 604 (1951) renouncing widow, entitled to a percentage of the estate after payment of "all just claims," required to bear portion of the Federal estate tax.

Indiana

No apportionment statute. In *Pearcy v. Citizens Bank*, 96 N.E. 2d 921 (1951), the court applied equitable apportionment against nonprobate assets. In *Merchants National Bank and Trust Co. of Indianapolis v. United States*, 246 F. 2d 410, 414 (7 Cir. 1957), the court, based on Indiana decisions, determined that a renouncing widow's share of the estate was not free of tax but criticized such decisions as including as "taxes accrued," in determining the widow's share, the Federal estate tax. It noted that the local statute involved "was enacted in 1881, when estate and inheritance taxes were unknown." In 1961, the Indiana Supreme Court, in *Seymour National Bank v. Heideman*, 278 N.E. 2d 771, held that notwithstanding the lack of an apportionment statute an electing widow's share, to the extent qualifying for the marital deduction, passed to her free of the tax. The basis of the decision is the "reason, logic and equity of the result reached."

Iowa

Statutory rule against apportionment "in testate matters" in absence of testamentary direction to the contrary. Ch. 326, Laws of 1963, effective January 1, 1964.

Prior thereto the Iowa courts applied the doctrine of equitable apportionment to nonprobate assets. *Kitzinger v. Millin*, 117 N.W. 2d 68 (1962).

Kansas

Statutory apportionment of "state estate tax." Kan. Gen. Stat. sec. 79-1501b (adopted in 1941).

In *First National Bank of Topeka, Kansas v. United States*, 233 F. Supp. 19 (D.C. Kan. 1964), the widow of an intestate decedent entitled to a share of his property determined after the payment of certain items (including "taxes") was held to take her share free of the Federal estate tax since the latter was not one of the taxes that the legislature had in mind. The court relied on *In Re Estate of Rooney*, 186 Kan. 280, 349 P. 2d 916 (1960).

Kentucky

No apportionment statute. Doctrine of equitable apportionment was adopted in *Hampton's Administrator v. Hampton*, 221 S.W. 496 (1920). Such was reiterated in *Martin v. Martin's Administrators*, 283 Ky. 513, 142 S.W. 2d 164 (1940) and in *Trimble v. Hatcher's Executors*, 173 S.W. 2d 985 (1943).

Lincoln Bank and Trust Co., Executor v. Huber, 240 S.W. 2d 89 (1951) holds that widow electing statutory share takes free of any Federal tax.

Louisiana

Apportionment statute. La. Stat. Ann. sec. 2431 et seq. (adopted in 1960). Prior thereto apportionment appears to have been applied between separate and community property (*Succession of Ratcliff*, 33 So. 2d 114 (1947)) but as between legatees apportionment was denied. *Succession of Mayer*, 875 So. 2d 303 (1956).

Maine

Adopted an equitable apportionment statute in 1945 (Maine Laws 1945, c. 269), but repealed it two years later (Maine Laws 1947, c. 220). Notwithstanding, the court in

Bragdon Trustee v. Worthley et al., 155 Me. 284, 294, 153 A. 2d 627 (1959) adopted the rule of equitable apportionment as to nonprobate assets. In *Old Colony Trust Co. v. McGowan*, 163 A. 2d 538 (1960), the court refused to exonerate a widow electing against the will from the Federal estate tax on the ground that the latter was encompassed within the statutory term "charges of settlement" in arriving at the distributable balance. It determined that legislation would be necessary to change the result citing *Wachovia, infra* (North Carolina) and *Uihlein, infra* (Wisconsin).

Maryland

Apportionment statute. Md. Ann. Code, art. 81, sec. 162 et seq. (adopted in 1937, amended in 1947, 1957 and 1965). By the Laws of 1937, ch. 544, provision was made for apportionment of the Federal estate tax against inter vivos transfers includible in the taxable estate. By the Laws of 1947, ch. 156, the widow's share of the nonprobate estate was exonerated but her share of the probate estate continued to bear a tax burden. If the wife renounced the will, there was no exoneration. *Weinberg v. Safe Deposit & Trust Co. of Baltimore*, 198 Md. 539, 85 A. 2d 50, 37 A.L.R. 2d 188 (1951).

By the Laws of 1957, ch. 747, a widow electing against the will was exonerated as to nonprobate assets. The Laws of 1965, art. 81, sec. 162 et seq., provided for full exoneration of property passing to a surviving spouse to the extent it qualifies for the marital deduction.

Massachusetts

Apportionment statute. Mass. Ann. Laws, c. 65A, sec. 5 (adopted 1943, amended in 1948). Present law provides for apportionment as to nonprobate assets but no apportionment as to probate assets. Prior to 1948, the statute

provided for apportionment as to both. *Merchants National Bank of Boston et al., Executors v. Merchants National Bank of Boston et al., Trustees*, 318 Mass. 563, 63 N.E. 2d 831 (1945). The 1948 amendment, which continues to date, re-establishes as to property passing by will the common law in Massachusetts before enactment of the original apportionment statute in 1943. *H. Weingartner et al. v. Town of North Wailes et al.*, 101 N.E. 2d 132 (1951).

Michigan

Apportionment statute. Mich. Stat. Ann. sec. 27.3178-165 et seq. (adopted 1963).

In a decision involving a prestatutory situation, the court, in *Old Kent Bank and Trust Company v. United States*, 232 F. Supp. 970, 984 (D.C. Mich. 1964) *revs'd* on other grounds, 362 F. 2d 444 (6 Cir. 1966) held, in the absence of a controlling state decision, that Michigan would adopt the rule of apportionment.

Minnesota

Apportionment statute. Minn. Stat. Ann. Vol. 31, ch. 525, sec. 525.521 et seq. (adopted 1961).

Prior thereto no rule of apportionment applied and tax was payable from the residuary estate. *Gelin v. Gelin*, 40 N.W. 2d 342 (1948). Latter decision recognized and applied in *United States v. Goodson*, 253 F. 2d 900 (8 Cir. 1958).

Mississippi

No apportionment statute and no State court decisions. In *Estate of Rosalie Cahn Morrison*, 24 T.C. 965 (1955), the Tax Court applied the so-called "majority rule" to a Mississippi situation.

Missouri

No apportionment statute. In *Carpenter v. Carpenter*, 267 S.W. 2d 632 (1954), although the will provided for the payment of Federal estate taxes assessed or levied upon any bequests or devises to be payable out of the residuary estate, nonprobate properties were required to bear their respective burdens of tax. In *Old Folks Home of St. Louis County v. St. Louis Union Trust Company*, 313 S.W. 2d 671, where one of the two residuary beneficiaries was exempt from tax, the entire tax due on the residuary estate was charged against the residuary share of the nonexempt residuary beneficiary. *Hammond v. Wheeler*, 347 S.W. 2d 884 (1961) and *Jones v. Jones*, 376 S.W. 2d 210 (1964) rule that the renouncing widow's share is exonerated from the tax.

Montana

No apportionment statute. Doctrine of equitable apportionment adopted in *Marans v. Newland*, 390 P. 2d 443 (1964) but wife there electing against the will was burdened with a share of the Federal estate tax (other than that on nonprobate assets) since the local statute involved subordinated a renouncing widow's statutory share to "all taxes including state and Federal inheritance and estate taxes."

Nebraska

Apportionment statute. Neb. Rev. Stat. sec. 77-2108 (adopted 1949). Amended in 1953 (ch. 94, Laws of 1953, s. 3) to clarify intent that marital deduction was exonerated from the tax.

Nevada

Apportionment statute. Nev. Rev. Stat. sec. 150.290-39 (adopted 1965).

New Hampshire

Apportionment statute. N. H. Rev. Stat., ch. 88-A:1 et seq. (adopted 1959). In *In Re William G. Barnhart Estate*, 120 N.H. 519, 162 A. 2d 168 (1960), to which the later enactment was not applicable, a widow electing against the will was exonerated from the Federal estate tax notwithstanding the local statute granted her a share of the personal estate "remaining after the payment of debts and expenses of administration," it being determined that the tax was neither.

New Jersey

Apportionment statute dealing with nonprobate assets. N. J. Stat. Ann., Tit. 3A, sec. 25-30 et seq. (adopted in 1950 and amended in 1951). Provides that nothing therein "shall be taken to require an apportionment of an estate tax inter sese among the legatees, devisees and beneficiaries under a will or among those who would take as the next-of-kin and heirs-at-law of a person dying intestate."

In *Dodd v. United States*, 223 F. Supp. 785 (D.C. N.J. 1963), *aff'd* 345 F. 2d 715 (3 Cir. 1965), the residue of an estate was divided equally between the surviving spouse and the surviving issue. On the point whether the widow's one-half share of the residue should be burdened by an estate tax, the courts ruled to the contrary, the United States Court of Appeals stating that it had "no doubt" that New Jersey would intend its citizens to have the full benefit of the "geographic equalization" which Congress provided for by establishing the marital deduction.

See also *Gesner v. Roberts* (N.J. Sup. Ct., 1967) CCH Inheritance, Estate and Gift Tax Reporter, State, Current, ¶ 20,017.

New Mexico

No apportionment statute. In *Re Gallagher's Will*, 57 N.M. 112, 55 P. 2d 317, 37 A.L.R. 149 (1953), the court

adopted the principle of equitable apportionment among all assets, probate and nonprobate, generating the Federal estate tax. While the marital deduction was not involved, the rationale of the decision would treat the widow's portion to the extent qualifying for the marital deduction as bearing no part of the tax.

New York

Apportionment statute. N. Y. Dec. Est. Law, sec. 124 (adopted 1930). Renouncing widow's share to the extent it qualifies for the marital deduction is exonerated from the Federal estate tax. *In Re Wolf's Estate*, 307 N.Y. 280, 121 N.E. 2d 224 (1954).

North Carolina

Apportionment statute (limited to share of renouncing widow). Gen. Stat. of N. Car., Vol. 2A, sec. 30-3 (adopted 1953).

In *Buffaloe v. Barnes*, 226 N. Car. 313, 38 S.E. 2d 222 (1946), the court ruled against the doctrine of equitable apportionment. In *Wachovia Bank and Trust Co. v. Green*, 236 N. Car. 654, 73 S.E. 2d 879 (1953), the court ruled that where a widow elected against the will the amount she took was reduced by Federal estate tax on the ground that the "surplus of the estate" in which she participated was an amount left after the payment of debts which included the tax.

Obviously to overcome the *Wachovia* decision, the North Carolina legislature in 1953 provided that where a widow dissented from the will and there were no children the widow receives one-half of the surplus free of any Federal estate tax. See *Tolson v. Young*, 260 N. Car. 506, 133 S.E. 2d 135 (1963).

North Dakota

Uniform Estate Tax Apportionment Act (S. D. 192, Laws of 1967).

Ohio

No apportionment statute.

Equitable apportionment of Federal tax applied against nonprobate assets in *McDougall v. Central National Bank of Cleveland, Trustee*, 157 Ohio St. 45, 104 N.E. 2d 441 (1952). In *Miller v. Hammond*, 156 Ohio St. 475, 104 N.E. 2d 9 (1952), a widow electing under the statute was held to take her share before any Federal estate tax under the court-applied rule of equitable apportionment in which it relied on *Lincoln Bank & Trust Co. v. Huber*, 240 S.W. 2d 89 (Ky. 1951). Thereafter, in *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E. 2d 695 (1954), the *Miller* case was overruled. The basis was not that the concept of equitable apportionment should not be followed, but that an Ohio statute was alleged to be inconsistent therewith under the facts involved (i.e., that an electing widow was limited to a maximum of one-half of the "net estate" in the determination of which Federal taxes must be deducted). Judge (now Justice) Stewart strongly dissented on the basis of the marital deduction provision in the Federal estate tax law.

In *Weeks v. Vandever*, the Probate Court of Cuyahoga County, Ohio, on April 22, 1966, deemed the rule in *Campbell v. Lloyd*, *supra*, as being inapplicable to a widow electing against the will where the language of a "tax clause" therein was sufficiently broad to exonerate her share from tax. See CCH Inheritance Estate and Gift Tax Reporter (State Current) para. 19,946.

Oklahoma

Apportionment statute. Okla. Stat. Ann., Vol. 58, sec. 2001 et seq. (adopted 1965).

Prior thereto the courts of Oklahoma rejected the doctrine of estate tax apportionment without the aid of the statute. In *Re Retten Meyer's Estate*, 345 P. 2d 872 (1959)

and see *Thompson v. Wiseman*, 233 F. 2d 734 (10 Cir. 1956). The same principle was adopted in *Tapp v. Mitchell*, 352 P. 2d 900 (1960) wherein such tax was treated as an expense of administration.

Oregon

Apportionment statute (limited to widow electing against the will and provides that to the extent her share qualifies for the marital deduction under the Federal estate tax law it is free of estate tax). Ore. Rev. Stat. sec. 113.050 (adopted in 1963).

Beatty v. Cake, 387 P. 2d 355 (1963) adopted equitable apportionment against nonprobate assets.

Pennsylvania

Apportionment statute. Pa. Stat. Ann., Tit. 20, sec. 881 et seq. (adopted 1937; revised 1951 to expressly cover marital deduction allowance).

Prior to legislation the Pennsylvania rule adopted by lower courts was against apportionment (*Newton's Estate*, 74 Pa. Super. 361 (1920)). *Estate of G. F. Uber*, 29 D & C 341 (1937), *aff'd* on other issues, 330 Pa. 417, 199 A. 356 (1938), but in *In Re Mellon's Estate*, 347 Pa. 520, 32 A. 2d 749, 757 (1943), the Supreme Court of Pennsylvania, noting that the "equitable principle of contribution" has long been enforced in the Commonwealth on principles of natural justice, rejected the lower courts' decisions and, with reference to the 1937 Apportionment Act, stated that the apportionment there involved "could be sustained either under the terms of the statute or upon the broad principle of equity here discussed."

In *In Re Rosenfeld's Estate*, 376 Pa. 42, 101 A. 2d 684 (1954), the Apportionment Act was construed to exempt from the Federal estate tax a widow's intestate share which qualified for the marital deduction provision of the Federal statute.

Rhode Island

No apportionment statute dealing with the Federal estate tax. Apportionment of the State estate tax provided for. Gen. Laws of R. I. Ann. sec. 44-23.21-22.

The general rule in Rhode Island is that the Federal estate tax is payable out of the residuary estate in the absence of direction to the contrary, but the courts have applied the doctrine of equitable apportionment thereof with respect to nonprobate assets. *Hooker v. Drayton*, 69 R.I. 290, 33 A. 2d 206 (1943); *Industrial Trust Co. v. Budlong*, 76 A. 2d 600 (1950).

South Carolina

No apportionment statute. Rule of equitable apportionment applied against nonprobate assets. *Myers v. Sinkler*, 235 S. Car. 162, 110 S.E. 2d 241 (1959).

Wife's intestate share also free of any Federal tax. *Pitts v. Hamrick*, 228 F. 2d 486 (4 Cir. 1954). See also *Smith v. United States*, 59-2 U.S.T.C. 11,907 (D.C. S. Car. 1959).

South Dakota

Apportionment statute. Chapter 196, Laws of 1961 (CCH Inheritance Estate and Gift Tax Reporter (State) p. 55,122).

Prior thereto courts refused to adopt the doctrine of equitable apportionment as to probate assets and held that the tax was properly charged against the residue of the estate. *Estate of Dellephine Burns*, 100 N.W. 2d 399 (1960).

Tennessee

Apportionment statute. Tenn. Code Ann. sec. 30-1117 (adopted 1943).

Prior thereto, under *Hutchinson v. Montgomery*, 112 S.W. 2d 827 (1938), equitable apportionment was denied on the basis that the Federal law placed the tax burden on the residue of the estate.

Texas

No apportionment statute. *Thompson v. Thompson*, 236 S.W. 2d 779 (1951) and *Sinnett v. Gidney*, 322 S.W. 2d 507 (1959) hold no apportionment of Federal estate tax within the probate estate, the tax being paid from the residue. The second decision left open the question of equitable apportionment against nonprobate assets.

Utah

No apportionment statute; no decisions found bearing on the point.

Vermont

No apportionment statute; no decisions found bearing on the point.

Virginia

Apportionment statute. Va. Code sec. 64-151 et seq. (adopted 1946). In 1952 the statute was amended to provide that such did not apply with respect to the benefit of the marital deduction allowable. In 1954 the statute was again amended to omit the latter limitation. Accordingly, no Federal estate tax is apportionable against the marital deduction allowance.

Washington

No apportionment statute. Federal estate tax is payable from the residue of the estate. *Seattle First National Bank, Executors, et al. v. Bank of California*, 138 Wash. Dec. 381, 230 P. 2d 297 (1951) and *Estate of M. Williamson*, 138 Wash. 247, 229 P. 2d 312 (1951).

West Virginia

Apportionment statute. W. Va. Code sec. 4162(1) (adopted in 1959).

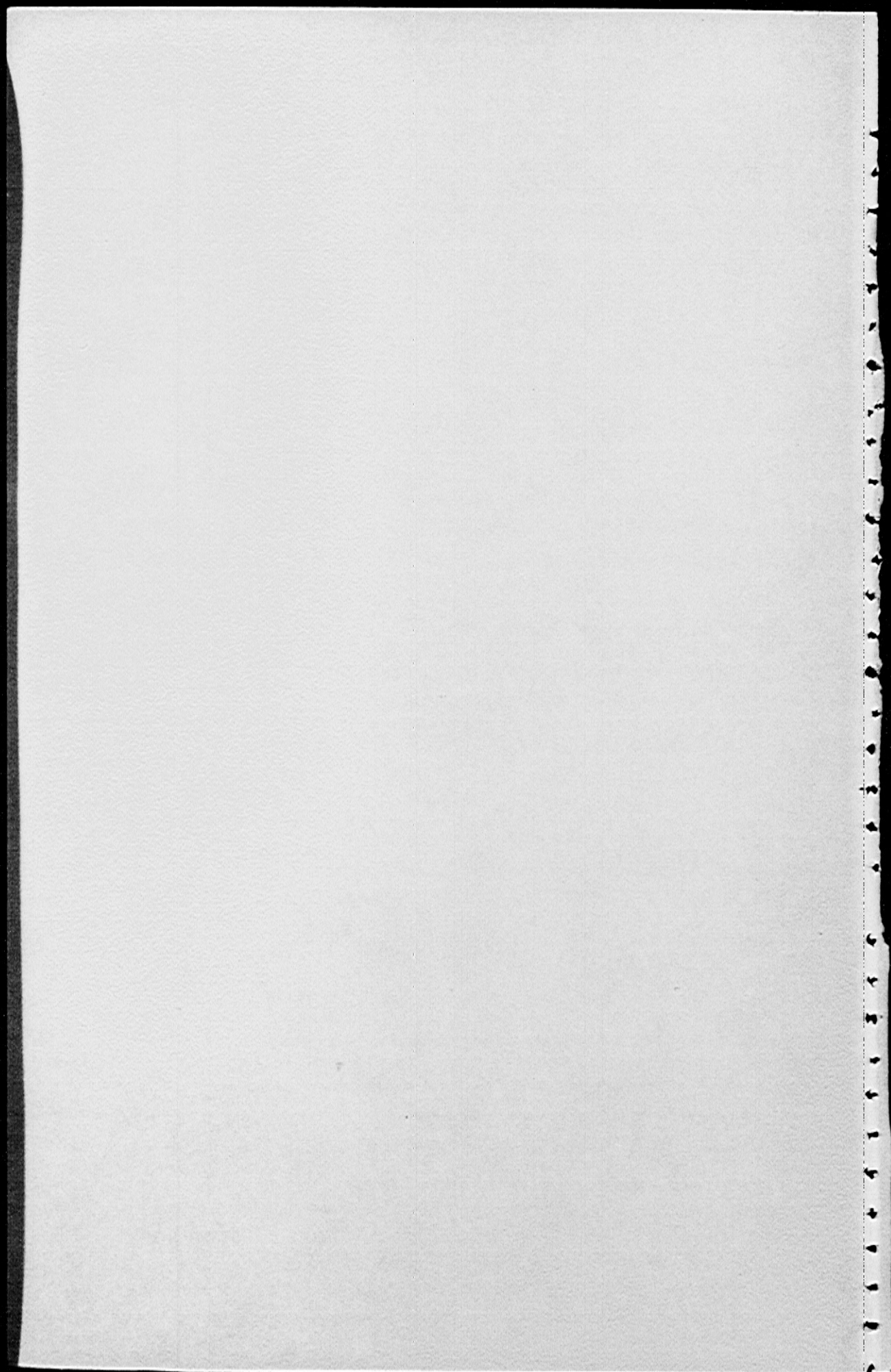
Prior thereto the courts followed the rule against equitable apportionment and placed tax burden on residuary estate. *Cuppett v. Neilly*, 105 S.E. 548 (1958) and *Guaranty National Bank v. Mitchell*, 111 S.E. 2d 494 (1959).

Wisconsin

No apportionment statute. Adopted rule of no apportionment against nonprobate assets. *In Re Joas' Estate*, 16 Wisc. 2d 489, 114 N.W. 2d 831 (1962). Widow electing against will must bear proportionate burden of estate tax since such tax must be set off in determining the "net estate" in which she shared. *In Re Uihlein's Will*, 264 Wisc. 362, 59 N.W. 2d 641 (1953).

Wyoming

Apportionment statute. Wyo. Stat. sec. 2-336 et seq. (adopted 1959).



BRIEF FOR THE APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR AND THE RIGGS NATIONAL BANK OF
WASHINGTON, D.C., AS EXECUTORS OF THE ESTATE OF
CHARLES DELMAR, DECEASED, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE ORDER AND JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals

for the District of Columbia Circuit

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STATEMENT OF QUESTION PRESENTED

In the opinion of the appellee the question is:

Whether the court below correctly sustained the determination of the Commissioner of Internal Revenue that the share of the decedent's probate assets distributable to his surviving spouse under the laws of the District of Columbia was one third of the balance or surplus of such probate assets remaining after deducting therefrom funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes, and that only such distributable share thus computed plus the widow's statutory allowance of \$500, less the District of Columbia inheritance taxes thereon, qualified for the marital deduction within the purview of Section 2056 of the Internal Revenue Code of 1954.

(1)

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Argument:	

The court below correctly sustained the determination of the Commissioner of Internal Revenue that, under the law of the District of Columbia, the share of the decedent's probate assets distributable to his surviving spouse was one-third of the balance or surplus of these probate assets remaining after deducting therefrom funeral expenses, debts, claims and all administration expense, including federal and District of Columbia estate taxes, and that only such distributable share plus the widow's statutory allowance of \$500, less the District of Columbia inheritance taxes thereon, qualified for the marital deduction within the purview of Section 2056 of the Internal Revenue Code of 1954.

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A. The federal estate tax (which is an excise tax upon the happening of an event, namely death, where the death brings about certain described changes in legal relationships affecting decedent's property) does not tax the interest in decedent's property to which legatees and devisees succeed at death, but taxes solely the decedent's interest in property which had ceased by reason of his death.

11

B. The federal estate tax is a lien which is impressed and attaches to the decedent's gross estate at the precise moment of his death and at that time becomes an obligation of the decedent's estate without assessment.

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C. The federal estate tax due from the decedent's estate is of the nature of an administration expense under the law of the District of Columbia, and further, as a lien which, at the precise moment of decedent's death had attached to decedent's probate assets, such tax constitutes a preferred general charge thereon which prior to distribution is to be paid out of the decedent's probate assets by the administrator or executor substantially as other taxes and charges are paid.

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(III)

Argument—Continued

The court below correctly sustained, etc.—Continued

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- D. In view of the absence of any statute or law in the District of Columbia (1) which apportions the decedent's federal estate tax among the beneficiaries of his estate or (2) which exonerates the share of his probate assets to which his surviving spouse is entitled under her election from any impact of the federal estate tax, it is obvious that the Congress intended that such tax is to be paid out of decedent's probate assets before any distribution of any portion thereof is made to his surviving spouse..... 18
1. It is clearly the Congressional purpose and intent that the federal estate tax should be paid by the executor or administrator of a testate or an intestate from the probate assets before making any distribution of the probate assets to beneficiaries under the will or under the descent and distribution statutes, unless such taxes are otherwise provided for in the will or apportioned under a pertinent state statute..... 18
 2. It is the province of the Congress, which enacts the statutes of the District of Columbia, to determine whether it should be the public policy of the District that a widow who renounces the will of her deceased husband and elects in lieu thereof to take her share of the husband's probate assets under the statutes of descent and distribution should receive her portion of these probate assets free from any impact of the federal estate tax..... 22
- E. It is the intention of the Congress acting in its role as the legislative body for the District of Columbia, whenever a decedent domiciled in the District of Columbia is survived by a spouse and a child, and that spouse disavows his will and elects to take her legal share of his probate assets, then such surviving spouse is entitled to receive only one-third of the balance or surplus of these assets remaining after the deduction therefrom of funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes..... 26
1. The term "surplus" of an intestate's probate assets which is distributable under the descent and distribution statutes of the District of Columbia as amended on September 14, 1961, and as re-enacted on September 14, 1965, means the balance of the intestate's probate assets remaining after deducting therefrom the intestate's funeral expenses, debts, claims against him, and all expenses incurred in the administration of his estate, including federal and District of Columbia estate taxes..... 26

Argument—Continued

The court below correctly sustained, etc.—Continued

E. It is the intention of the Congress, etc.—Continued

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(b) The Congress in amending Section 18-101 of the District of Columbia Code (1961 ed.) on September 14, 1961, manifested its intention that surplus probate assets or net probate assets, which are indistinguishable under the descent and distribution statutes, are only the probate assets of the intestate remaining after deducting therefrom funeral expenses, debts, claims and all expenses of administration, including federal and District of Columbia estate taxes.....	34
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2. Congress, in its characterization in Section 18-211(c), District of Columbia Code (1961 ed.), as amended September 14, 1961, of the distributable portion of an intestate's probate estate as his "net estate," intended that such distributable portion includes only the balance or surplus of the intestate's probate estate remaining after deducting therefrom funeral expenses, debts, claims, and all expenses of administration, including federal and District of Columbia estate taxes.....	41

Argument—Continued

The court below correctly sustained, etc.—Continued

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F. There is no merit to taxpayer's contention that the Congress, in enacting the marital deduction provisions in 1948 "implicitly expected" (Br. 30) that this Court, by judicial fiat, "must adopt a [so-called] rule of equitable apportionment of the [federal estate] tax" (Br. 5) in order to free from any impact of the federal estate tax the share of the distributable surplus of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703 of the District of Columbia Code (1961 ed.).....

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1. Taxpayer's contention that it was the intention of the Congress that the settled application of the statutes of descent and distribution should by judicial fiat be modified by this Court as a result of the enactment of the marital deduction provisions, to the end that a surviving spouse's share of the probate assets of her deceased husband to which she is entitled under Section 18-703 of the District of Columbia Code (1961 ed.) should be free from any impact of federal estate taxes, (and thereby increasing the amount of the allowable marital deduction) in order that "the purpose of the Congress [in enacting such deduction] will [not] be thwarted" (Br. 34), is devoid of any merit.....

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2. Contrary to taxpayer's contention, Section 2056(b)(4) of the Internal Revenue Code of 1954 negates and disclaims any intention on the part of Congress that the one-third of the surplus of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703 of the District of Columbia Code should escape any impact of any federal estate tax.....

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3. Taxpayer's contention (Br. 20, 24) that with the enactment of the marital deduction provisions in 1948 the Congress expressly provided that the surviving spouse, in the case of intestacy or election against the will of a testate decedent should take her statutory share free of any estate tax merely because her distributable share under the descent and distribution statutes of the states qualifies for the marital deduction is devoid of any merit and flies in the face of the *ratio decidendi* in the opinions of the Supreme Court in *Y.M.C.A. v. Davis* and *Harrison v. Northern Trust Co.*.....

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Argument—Continued

The court below correctly sustained, etc.—Continued

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G. The unappealed decision of the United States District Court for the District of Columbia in <i>In re Estate of Collins</i> , decided on June 13, 1967, and relied upon by the taxpayer does not refer to or discuss any decision of any District of Columbia court, is in direct conflict with <i>Herson v. Mills</i> , is contrary to the law as embodied in the jurisprudence of the District of Columbia, and should not be followed.....	52
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

ROLAND H. DEL MAR AND THE RIGGS NATIONAL BANK OF
WASHINGTON, D.C., AS EXECUTORS OF THE ESTATE OF
CHARLES DELMAR, DECEASED, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE ORDER AND JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

COUNTERSTATEMENT OF CASE

This is an appeal by the Estate of Charles Delmar, deceased (hereinbelow sometimes referred to as taxpayer) from the Order and Judgment of the United States District Court for the District of Columbia (JA 13), in which that court "dismissed with prejudice" the action of taxpayer praying for a refund of federal estate taxes in the amount of \$355,942.82 plus interest. JA 4-7.)¹

The ultimate question which this appeal presents to this Court for decision is whether the court below correctly sustained the determination of the Commissioner of Internal Revenue that under Section 2056 of the Internal Revenue Code of 1954 the allowable marital deduction from the statutory gross estate of Charles Delmar, deceased (hereinbelow some-

¹ It should parenthetically also be pointed out that taxpayer has asserted that a reversal by this Court of the judgment of the court below would "automatically give rise to a refund of District of Columbia estate tax" (JA 45) in an amount estimated to be about \$77,000.

times referred to as decedent) was only \$1,727,174.17 (JA 41) instead of \$2,413,769.26, as contended for by the taxpayer (JA 22).

Because of (1) the decedent's surviving spouse's renunciation of the devises and bequests to her under decedent's will, and (2) of her election "to take in lieu thereof my [her] legal share of the real and personal property" of decedent (JA. 46), the adjudication of this "ultimate question" herein presented to this Court for decision is dependent upon a determination of the amount of the distributable share of the probate assets which the surviving spouse is entitled to receive under the laws of the District of Columbia, including Sections 18-101, 18-211, 18-530, 18-701 and 18-703 of the District of Columbia Code (1961 ed.), as amended on September 14, 1961.² (Appendix, *infra*).

And this determination of the amount of the distributable share of the probate assets which the surviving spouse is en-

² Section 18-101 as pertinent provides that under the laws of descent and distribution, "such surviving spouse and kindred shall take as tenants in common" "the surplus personal property of * * * intestate" "according to the laws of the District of Columbia now or hereafter in force relating to the distribution of the personal property of intestates" and the "real property [of intestate] shall be liable, in the event of insufficiency of the personal property, for the payment of the intestate's funeral expenses, debts, costs of administration, and estate * * * taxes in the same manner and to the same extent as the personal property of such intestate". (Appendix, *infra*).

Section 18-211 (a) as pertinent empowers a surviving spouse to make such renunciation and election within six months after the death of the deceased spouse. Section 18-211 (e) as pertinent provides that the distributable legal share of the surviving spouse in the probate assets of the decedent is the same as she "would have taken had the deceased spouse died intestate", and in no "event shall the surviving spouse be entitled to more than one-half of the *net* estate bequeathed and devised by said will". (Emphasis supplied.) (Appendix, *infra*).

Section 18-530 as pertinent provides that when "all the claims against, or debts of, the decedent which have been known by or notified to him [the "executor or administrator"] have been discharged * * *, it shall be his duty to deliver up and distribute the *surplus or residue* of the personal estate not disposed of by any will, as herein directed". (Emphasis supplied.) (Appendix, *infra*).

Section 18-701 as pertinent provides that "When the debts of an intestate * * * shall have been discharged * * *, the administrator shall proceed to make distribution of the *surplus* as provided in this chapter". (Emphasis supplied.) (Appendix, *infra*).

Section 18-703 as pertinent provides that "If there be a widow * * * and a child * * *, the widow * * * shall have one-third only [of such surplus]". (Appendix, *infra*).

titled to receive under District of Columbia law is in turn dependent upon the resolution of a very narrow and restricted question, to wit, whether, under the laws of the District of Columbia, the legal share of the decedent's probate assets which is distributable to his surviving spouse is, as contended by the Government, one third of the balance, residue or surplus of these probate assets remaining *after* deducting therefrom funeral expenses, debts, claims and all administration expenses, *including* federal and District of Columbia estate taxes, or, as contended by the taxpayer, one third of the balance, residue or surplus remaining *prior* to the deduction of such items. The court below, in granting the Government's cross-motion for summary judgment and in denying the taxpayer's motion for such judgment and in dismissing "with prejudice" taxpayer's action (JA 13), answered this narrow and restricted question against the contentions of the decedent's estate.

The facts are not in controversy.

On August 17, 1963, the decedent, Charles Delmar, a domiciliary of the District of Columbia, died testate,³ survived by a son of a previous marriage and a wife of a subsequent marriage. (JA 14, 29; Br. 2.)⁴ Since January 20, 1964, the decedent's son, Roland H. Del Mar, and the Riggs National Bank of Washington, D.C., have been the executors of his estate. (JA 14-15.)

On November 16, 1964, these executors filed the federal estate tax return for the Estate of Charles Delmar. (JA 15-16.) As reported thereon, the value of the decedent's statutory gross estate was \$8,271,593.50⁵ (JA 40), broken down as follows (JA 34-35, 38):

Real Estate.....	\$189,504.00
Stocks	7,349,923.79
Bonds	51,990.17
Cash	627,112.30
Note	6,250.00
Accrued Interest.....	92.89
Miscellaneous Property.....	11,516.35

³ The decedent executed his will on December 12, 1957 (JA 30), and republished it by his first codicil thereto on October 31, 1958, and again by his second codicil thereto on April 26, 1961 (JA 31, 32).

⁴ The symbol "Br." refers to the brief of the taxpayer.

⁵ Upon audit, it should be noted that the District Director of Internal Revenue increased the value of the decedent's statutory gross estate as reported on the federal estate tax return by \$17,992. (JA 41.) The correctness of this increase is not involved in the instant appeal.

Insurance	\$35,204.00
Total statutory gross estate.....	* 8,271,593.50

Two and one half months after the death of decedent, to wit, on November 1, 1963, the surviving spouse of decedent did "*renounce and quit all claim to any devise or bequest made to me [her] by the last Will of my [her] husband*"⁷ and did "*elect to take in lieu thereof my [her] legal share of the real and personal property of my said spouse [the decedent].*" (Emphasis supplied.) (JA 46.)

As a result of such renunciation and election, the executors of the Estate of Charles Delmar, deceased, as disclosed by the federal estate tax return which they filed on November 16, 1964 (JA 15-16, 33-40), some fifteen months after the death of decedent, did distribute to decedent's surviving spouse her "legal share of the real and personal property of my [her] said spouse." The legal share of the decedent's probate assets which the executors distributed to the decedent's surviving spouse was one-third of the balance or surplus of these probate assets, remaining *after* deducting therefrom funeral ex-

* As thus reported on the federal estate tax return, the value of the non-probate assets constitutes about one half of one percent of the value of the decedent's statutory gross estate. The value of the real property, which is part of the probate assets of decedent, constitutes about 2.3 percent of the value of the decedent's statutory estate. And the value of the personal property which is also part of the probate assets of decedent constitutes more than 97 per cent of decedent's statutory gross estate.

⁷ In paragraph (3) of his will the decedent had devised and bequeathed to his surviving spouse their home and the furnishings therein. (JA 28-29.) In paragraph (4) thereof he created a spendthrift testamentary trust whose corpus consisted solely of personal property, granting her the income for life with a limited power of appointment. (JA 31.) The value of the corpus of such testamentary trust was to be arrived at in accordance with the provisions of the first sentence of paragraph (4) of the will, which provides as follows (JA 29):

"(4) I give and bequeath to my trustees so much of my personal property as, when increased by the real and personal property devised and bequeathed to my wife, Jacqueline Delmar, by Paragraph (3) hereof, may be equal to one-third of the sum of (a) all personal property distributable by my executors under this will, after the payment of all funeral expenses, expenses of administration of my estate, and debts of my estate (including all estate and inheritance taxes payable by my executors under Paragraph (14) hereof), and (b) all real property owned by me at the time of my death."

Paragraph (14) provided (JA 30):

"(14) My executors *shall pay out of my residuary estate (without any right of reimbursement) all estate, inheritance, and succession taxes, and all other governmental charges which may be assessed against any gift made by me under this will * * *.*" (Emphasis supplied.)

penses, debts, claims, and all administration expenses, including federal and District of Columbia estate tax. (JA 22, 38, 40.) Such method of arriving at the distributable "legal share" under the laws of the District of Columbia was also followed and approved by the District Director in his audit of the federal estate tax return in his determination of the federal estate taxes of the Estate of Charles Delmar (JA 41),⁸ and it was sustained by the court below (JA 13).

Subsequently the executors filed a claim for refund of federal estate taxes. (JA 42-44.) Therein they contended that their original method and the District Director's method of computing the surviving spouse's distributable legal share of decedent's probate assets were wrong, on the ground that under the laws of the District of Columbia, the surviving spouse's distributable "legal share of the real and personal property of [decedent]" "should not be [have been] reduced for either the Federal or District of Columbia estate tax."⁹ (JA 44.)

In denying this claim for refund the District Director stated (JA 41):

The claim for refund in the amount of \$367,998.58 filed on June 25, 1965, with respect to the above estate has been disallowed. Decedent's spouse's share of the estate is to be computed after the deduction of Federal and District of Columbia estate taxes. *Herson v. Mills*, Dist. Ct. D.C., 221 Fed. Supp. 714 (1963).

In open court below, in support of its motion for summary judgment in which it had averred that the decedent's surviving

⁸ The District Director upon audit slightly increased the value of decedent's statutory gross estate and slightly decreased the claimed administration expenses. (JA 41.) None of these adjustments are now being contested in this Court. These adjustments resulted in a federal estate tax deficiency in the amount of \$7,015.29 plus interest, which the executors paid on August 25, 1966. (JA 6, 9.) Also as a result of these adjustments the District Director increased the allowable marital deduction from \$1,725,725.58, as reported on the federal estate tax return (JA 37-38, 40), to \$1,727,174.17 (JA 41).

⁹ The decedent's surviving spouse could not, of course, have joined in this claim for the refund of federal estate taxes. But it may also be pointed out that the record does not disclose that any action was undertaken by the decedent's surviving spouse against the executors for an additional payment to her of an amount equal to her share of federal and District of Columbia estate taxes, i.e., about \$720,099.27. (JA 41.) Of course, on the other hand, as a result of their claim for refund, the executors are, in effect, for the first time contending that they had neglected to distribute such sum to the decedent's surviving spouse.

spouse "takes her statutory share of the estate free of any Federal or District of Columbia estate tax" (JA 11), the taxpayer contended that *Herson v. Mills* (which was cited by the District Director in support of his rejection of taxpayer's claim for refund and which is incontrovertibly on all fours with the instant case (Br. 7)) was wrong and should not be followed, stating (JA 49):

I was very happy that the motion was heard by you, because I felt that if any Judge on the District Court would reverse *Henson* [sic] versus *Mills*, then it would be its author.

As noted, the court below, however, denied taxpayer's motion for summary judgment and granted the Government's cross-motion for summary judgment.¹⁰ (JA 13, 52.)

No opinion was written by the court below. However, by its Order and Judgment (JA 13), it is plain that the court below did *not* reverse its decision in *Herson v. Mills*, 221 F. Supp. 714, in which, upon basically identical facts,¹¹ it observed (pp. 715, 716):

The federal estate tax being in the nature of an administration expense is taken from the estate before the property is set off to the beneficiaries.

* * * the federal estate tax * * * is a lien on the decedent's estate *before* distribution and the executors are liable for its payment. (Emphasis supplied.)

The intent of Congress was that the federal estate tax should be paid out of the estate as a whole * * * where the *law of the jurisdiction* provides [not] otherwise the burden of the federal estate tax rests, like other

¹⁰ Immediately after Judge Matthews, sitting as the court below, who was the author of the opinion in *Herson v. Mills*, had ruled, "I will have to deny your motion [for summary judgment], Mr. Brown," the following colloquy took place (JA 48):

"Mr. Brown: Well Your Honor, have you reached that decision without reading the briefs?

"The Court: I have read the briefs; I read them before today.

"Mr. Brown: I see, Your Honor.

"Well, if the Court please, I didn't expect much to the contrary—I will be perfectly frank with you."

¹¹ In taxpayer's sole reference in its brief to *Herson v. Mills*, *supra*, taxpayer boldly brushes it aside only by asserting that it does "recognize that the issue here presented, in essence, was resolved adversely to them [it] in *Herson v. Mills*." (Br. 7.)

administration expenses, on the general estate and is not apportioned among the beneficiaries of the estate. (Emphasis supplied.)

* * * there is *no* provision in the federal estate tax law or *in any law of this jurisdiction which* apportions the federal estate tax, among the beneficiaries of a decedent's estate or *exempts* the widow's share from liability. (Emphasis supplied.)

Thus, the court in *Herson v. Mills* held that an "interest [in property] passing from the decedent to the surviving spouse" under the laws of descent and distribution of the District of Columbia, which qualifies for the marital deduction within the meaning of the federal estate tax law, is "not absolve[d] * * * from contribution to the [federal estate] tax ultimately imposed" (p. 715).

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the statutes and other authorities herein involved are set forth in the Appendix, *infra*.

SUMMARY OF ARGUMENT

The widow of Charles Delmar, who died in 1963 with probate assets in excess of \$8,000,000, renounced his will and elected to take her share of the decedent's property under the statutes of descent and distribution of the District of Columbia. The statutes of descent and distribution as enacted in the Maryland Laws of 1789 provided that whenever an intestate is survived by a spouse and a child, his surviving spouse was entitled to receive one-third of the "surplus" of his personal property. Such law was also the law of the District of Columbia from the date of its creation and was incorporated by the Congress in the Code of the District of Columbia in 1901. Accordingly the interpretation of these provisions by the Court of Appeals of Maryland has been deemed to be of persuasive authority in this Court.

The Congress in 1957 amended the Code of the District of Columbia (1951 ed.) and therein provided that such surviving spouse's interest, instead of being restricted to one-third of the surplus personal property of the decedent was expanded to include one-third of the surplus assets of the intestate which

included both the intestate's personal property and his real property.

The Congress on September 14, 1961, again amended the statutes of descent and distribution as codified in the D.C. Code (1961 ed.) which included the 1957 amendments. As thus amended the statutes of descent and distribution expressly provide that in the event that the personal property of the intestate were not sufficient "for the payment of the intestate's funeral expenses, debts, costs of administration, and estate * * * taxes" then the real property of the intestate would be called upon for such payment "in the same manner and to the same extent as the personal property of such intestate".

In 1965, the Congress re-codified that portion of the D.C. Code entitled "Decedents' Estates and Fiduciary Relations" which includes the statutes of descent and distribution. Its purpose was not "to make any substantive changes in the law" but "to reflect in those changes only what apparently was the legislative intent, or is implied in the provisions themselves, or has been stated by the courts in construing the sections."

The modern Federal Estate Tax Act was enacted in 1916 and it expressly provides that the federal estate tax is in effect a preferred charge against the intestate's gross estate, being a lien which attaches to such gross estate at the precise moment of the death of the decedent. This Court, the Court of Appeals of Maryland and other courts throughout the United States have treated and considered the federal estate tax of an intestate as being an expense of administration or debt of the decedent. It is the settled law of the District of Columbia, of Maryland and of other states that the "surplus" of the probate assets of an intestate which are distributable under the statutes of descent and distribution is the balance of the intestate's personal property or personal and real property, remaining after deducting therefrom the intestate's funeral expenses, debts, and costs of administration including the federal estate tax.

Accepting such settled law, the Congress in its role as the legislative body for the District of Columbia has not seen fit to enact any apportionment statutes for the District of Columbia which would in anywise apportion federal estate taxes among the various beneficiaries of the intestate. Congress was not without the knowledge that the Supreme Court in 1942 had declared the states were empowered to enact apportionment

statutes which could apportion federal estate taxes among the beneficiaries of an intestate.

The Congress in 1948 amended the Federal Estate Tax Act by allowing the estate of an intestate to take as a marital deduction from his gross estate the value of the property of the intestate which passed from him to his surviving spouse, not exceeding one-half of his adjusted gross estate. Neither this 1948 amendment, nor any other provision of the federal estate tax statute provides for the exoneration from the impact of the federal estate tax of that property of the interstate which had passed from him to his surviving spouse under the statutes of descent and distribution.

However, as a result of the power resting in the states to enact apportionment statutes which in effect modify the application of the statutes of descent and distribution, many states have enacted a variety of inconsistent and differentiating apportionment statutes. Some states interestingly enough expressly provided that when a surviving spouse renounces her deceased spouse's will and elects to take a share of his probate assets under the statutes of descent and distribution, in no event, is that share of his probate assets which she so receives free from any impact of any federal estate tax.

By not enacting for the District of Columbia any apportionment statute and by re-enacting as recently as 1965 the statutes of descent and distribution which as here pertinent, have been in existence since 1789, Congress incontrovertibly has established the public policy for the District with respect to the devolution of property of an intestate. Some 21 states similarly have *not* enacted any apportionment statutes. However, taxpayer nevertheless contends that this Court should, by judicial fiat, create public policy in this area of the devolution of property of an intestate and thereby assume the prerogatives of the Congress by declaring a rule of law which would in effect adopt the identical public policy inherent in some of the apportionment statutes adopted by some states. Courts generally have avoided creating such public policy by judicial fiat. Thereafter some of these states enacted apportionment statutes.

It is incontrovertible that in recodifying the statutes of descent and distribution in 1965 the Congress chose not to enact

any apportionment statute for the District, even though in 1963, the District Court of the District of Columbia in *Herson v. Mills* had expressly refused to create such rule by judicial fiat. No appeal was taken from that case. Its holding, however, was in accord with the settled law of the District of Columbia, namely that federal estate taxes are in the nature of administration expenses, and, as buttressed by the clarifying 1961 amendment to the District of Columbia Code, that federal and state taxes are deductible from the probate assets of the intestate *before* computing the "surplus" of the intestate probate assets which are distributable under the statutes of descent and distribution. The holding in this case is widely known and prior and subsequent thereto has been consistently followed and applied. This settled law was in fact followed by the executors of the estate of decedent when they filed the federal estate tax return. However, on claim for refund, the executors took a different position which has created the issue in the instant case.

In view of the foregoing, it is respectfully submitted that the court below properly refused, by judicial fiat, to create a rule of law (embodying the gist of the apportionment statutes of some states), which would free the share of a widow which she had received under the statutes of descent and distribution (after renouncing her husband's will) from any impact of the federal estate tax. Accordingly, the court below was correct in granting the Government's cross-motion for summary judgment, and its judgment sustaining the determination of the Commissioner that the allowable marital deduction from the statutory gross estate of the decedent is only one-third of the "surplus" or balance of decedent's probate assets remaining *after* deducting therefrom the decedent's funeral expenses, debts and all expenses of administration including federal and District of Columbia estate taxes (plus \$500 widow's allowance, less the succession taxes imposed thereon by the District) should be affirmed.

ARGUMENT

The court below correctly sustained the determination of the Commissioner of Internal Revenue that, under the law of the District of Columbia, the share of the decedent's probate assets distributable to his surviving spouse was one-third of the balance or surplus of these probate assets remaining after deducting therefrom funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes, and that only such distributable share plus the widow's statutory allowance of \$500, less the District of Columbia inheritance taxes thereon, qualified for the marital deduction within the purview of Section 2056 of the Internal Revenue Code of 1954

It is the position of the Government that the court below correctly sustained the determination of the Commissioner of Internal Revenue that, under the law of the District of Columbia, the share of the decedent's probate assets distributable to his surviving spouse was one-third of the balance or surplus of these probate assets remaining after deducting therefrom funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes, and that only such distributable share plus the widow's statutory allowance of \$500, less the District of Columbia inheritance taxes thereon, qualified for the marital deduction within the purview of Section 2056 of the Internal Revenue Code of 1954, Appendix, *infra*.

A. The federal estate tax (which is an excise tax upon the happening of an event, namely death, where the death brings about certain described changes in legal relationships affecting decedent's property) does not tax the interest in decedent's property to which legatees and devisees succeed at death, but taxes solely the decedent's interest in property which had ceased by reason of his death

It is settled law that the federal estate tax "is not levied upon the property of which an estate is composed. It is an *excise* tax imposed upon the *transfer* of or *shifting* in relationship to property at death". (Emphasis supplied.) *U.S. Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939). Or, as stated in *Tyler v. United States* 281 U.S. 497, 502 (1930), it is "A tax laid upon the happening of an event, as distinguished from its tangible fruits, * * * the event is *death* and the result which is made the occasion of the tax is *the bringing into being or the enlargement of property rights* * * *". (Emphasis supplied.) See also:

Fernandez v. Wiener, 326 U.S. 340, 352 (1945); *Estate of Roger v. Commissioner*, 320 U.S. 410, 413-414 (1943); *Whitney v. Tax Commission*, 309 U.S. 530, 539 (1940).

This Court in *Hepburn v. Winthrop*, 65 U.S. App. D.C. 309, 314, 83 F. 2d 566, 571 (1936), in accordance with such settled law, held:

The [federal estate tax] statute does not tax the property, but the privilege of transfer. What was really imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties, as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeed on death, but the interest which ceased by reason of death. *Young Men's Christian Ass'n v. Davis*, 264 U.S. 47-50, 44 S. Ct. 291, 292, 68 L. Ed. 558.

And the District Court in *Herson v. Mills*, 221 F. Supp. 714 (D.C.D.C. 1963), citing *Hepburn*, *supra*, properly held (p. 715):

In general the federal estate tax is a levy imposed upon the transfer of property at death. It is not an inheritance or succession tax, that is, it is not a tax on what devisees, legatees, beneficiaries, or heirs receive, but is a tax on the interest which is shifted or transferred by reason of the death of the owner.

B. The federal estate tax is a lien which is impressed and attaches to the decedent's gross estate at the precise moment of his death and at that time becomes an obligation of the decedent's estate without assessment

It is the position of the Government that the federal estate tax is a lien which is impressed and attaches to the decedent's gross estate at the precise moment of his death and at that time becomes an obligation of the decedent's estate without assessment.

The Congress has expressly provided that at the precise moment of the decedent's death, the federal estate tax of the decedent which is to be paid by his executor or administrator is a "lien for 10 years upon the gross estate of the decedent". Section 6324, Internal Revenue Code of 1954, Appendix, *infra*. The Supreme Court in *Detroit Bank v. United States*, 317 U.S.

329 (1943), in construing the predecessor identical statute, held (p. 332):

The [federal estate tax] lien attaches at the date of the decedent's death, since the gross estate is determined as of that date and the estate tax itself becomes an obligation of the estate at that time without assessment.

And the Court stated in *Fernandez v. Wiener*, 326 U.S. 340, 345 (1945), that "The revenue laws * * * providing [provide] that the [federal estate] tax shall be a lien on all of the property included in the decedent's gross estate."

Furthermore, the Supreme Court in *Michigan v. United States*, 317 U.S. 338 (1943), in acknowledging "the effect of a lien for federal estate taxes under the supremacy clause of the Constitution," held (p. 340):

* * * it is not debatable that a tax lien imposed by a law of Congress * * * cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision [and] * * * could not be set aside by state legislation.

This Court in *Hepburn v. Winthrop*, *supra*, p. 314, 83 F. 2d, p. 571, in accordance with such settled law, held that the revenue laws of the United States require "the executor to make the [federal estate] tax return and to pay the tax and until paid, for ten years, the tax is a lien upon the gross estate". Similarly, the United States District Court for the District of Columbia in *Herson*, *supra*, citing *Hepburn*, *supra*, held (p. 715): "The [federal estate] tax is a lien on the decedent's estate before distribution and the executors are liable for its payment."

C. The federal estate tax due from the decedent's estate is of the nature of an administration expense under the law of the District of Columbia, and further, as a lien which at the precise moment of decedent's death had attached to decedent's probate assets, such tax constitutes a preferred general charge thereon which prior to distribution is to be paid out of the decedent's probate assets by the administrator or executor substantially as other taxes and charges are paid

It is the position of the Government that the federal estate tax due from the decedent's estate is of the nature of an administration expense under the law of the District of Columbia, and further that, as a lien which at the precise moment of decedent's death had attached to decedent's probate assets, such tax constitutes a preferred general charge thereon which

prior to distribution is to be paid out of the decedent's probate assets by the administrator or executor substantially as other taxes and charges are paid.

We have shown in Subdivision B of our brief, *supra*, that the federal estate tax is a lien which is impressed upon and is attached to the decedent's gross estate at the precise moment of his death and becomes an obligation of his estate without assessment. The Supreme Court in *United States v. Woodward*, 256 U.S. 632 (1921), held (p. 635):

It [the federal estate tax] is made a charge on the estate and is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid. It is made a general charge on the gross estate * * *.

This Court in *Hepburn v. Winthrop*, *supra*, held that the federal estate tax "is of the nature of an administrative expense." And in the recent case of *District of Columbia v. Payne*, — U.S. App. D.C. —, 374 F. 2d 261, 265, decided on December 22, 1966, this Court restated such holding as follows:

We held in *Hepburn v. Winthrop*, 65 App. D.C. 309, 83 F. 2d 566 (1936), 105 A.L.R. 310 that payment of the [federal] estate tax out of the personal residuary estate is similar to the payment of debts, and *thus an expense of the administration of the estate*. (Emphasis supplied.)

In restating such settled law, this Court also expressly rejected the contention of the taxpayer in *Payne* "that *Hepburn* has been overruled by the Supreme Court in *Riggs v. Del Drago*, 317 U.S. 95 (1942)." In this connection this Court stated (— U.S. App. D.C., p. —, fn. 4, 374 F. 2d, p. 264, fn. 4):

That case [*Riggs*] merely held that the federal estate tax should be paid out of the estate as a whole, and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal estate tax; also, in *Riggs*, it was the New York apportionment law that was involved.

It should here be stressed that the taxpayer in the instant case has in effect merely reiterated this identical contention which this Court in *Payne* had unequivocally rejected. In its

brief here, taxpayer contends in effect that *Riggs v. Del Drago*, 317 U.S. 95 (1942), has nullified * * * the decision of this Court, *Hepburn v. Winthrop*" (Br. 14), and notwithstanding the rejection of such contention by this Court in *Payne, supra*, insists that *Hepburn* "is predicated upon an erroneous concept of the law and should be appropriately reversed * * *." (Br. 7). The identical contention was made by taxpayer in open court below. It was there stated by counsel (JA 50): "I believe that *Hepburn* versus *Winthrop* was so undermined by *Riggs* versus *Del Drago* * * *." The court below, in rejecting such contention, stated (JA 50):

I don't see why you say that. All this case that you mentioned last [*Riggs*] decided was that New York could provide a method of apportionment.

It should be pointed out that the holding by this Court in *Hepburn*, was also cited in *Herson, supra*, and was even favorably cited in *Riggs* (p. 99, fn. 4), much less overruled. Furthermore, it should also be pointed out, that subsequent to the decision of the Supreme Court in *Riggs*, *Hepburn* has been favorably cited by many other courts throughout the nation.¹¹

Taxpayer in effect concedes that *Herson, supra*, which was also decided by Judge Matthews, sitting as the United States District Court for the District of Columbia, not only is on all fours with the case at bar but "was resolved adversely to them [it]." (Br. 7.) Taxpayer in its brief after quoting merely one sentence from the opinion in *Herson* (Br. 7) declares, *ex cathedra* and without further comment that *Herson* "rests upon an erroneous foundation" (Br. 5) because the court in *Herson* "In reaching its decision * * * relied upon *Hepburn v. Winthrop*" (Br. 7). The single sentence quoted from *Herson* (p. 7) was lifted out of context from a paragraph in the opinion in *Herson* which reads as follows (pp. 715-716):

The intent of Congress was that the federal estate tax should be paid out of the estate as a whole and

¹¹ *In re Estate of McLaughlin*, 52 Cal. Rptr. 543, 544, (1966); *Old Colony Trust v. McGowan*, 156 Maine 138, 144, 163 A. 2d 538, 542 (1960); *Lawless v. Lawless*, 17 Ill. App. 2d 481, 489, 150 N.E. 2d 646, 650 (1958); *Morrison v. Commissioner*, 24 T.C. 965, 971 (1955); *Clarke v. Weldon*, 204 Md. 26, 29, 102 A. 2d 560, 561 (1953); *In re Estate of Gelin*, 229 Minn. 516, 522, 40 N.W. 2d 342, 346 (1949); *In re Berger's Estate*, 183 Misc. 366, 368, 50 N.Y.S. 2d 550, 551-552 (1944); *Estate of Bauer*, 59 Cal. App. 2d 152, 158, 138 P. 2d 717, 720, (1943).

that the distribution of the remaining estate and the ultimate impact of the federal tax should be determined under the law of the place having the administration of the estate. *Riggs v. Del Drago*, 317 U.S. 95, 63 S. Ct. 109, 87 L. Ed. 106. It is a general rule that where neither the will of the decedent nor the law of the jurisdiction provides otherwise, the burden of the federal estate tax rests, like other administrative expenses, on the general estate and is not apportioned among the beneficiaries of the estate. Mertens' Law of Federal Gift and Estate Taxation, § 30.05, p. 652. The federal estate tax being in the nature of an administration expense is taken from the estate before the property is set off to the beneficiaries. The tax is not a payment as to which the beneficiaries have any concern as it is a charge against the estate and not the legatees or distributees. *Hepburn v. Winthrop*, 65 App. D.C. 309, 83 F.2d 566.

The principles set forth in the above excerpt from *Herson*, we respectfully submit, when read in relation to the incontrovertible law as summarized in the four paragraphs preceding the above quotation from the opinion of *Herson*, clearly support the holding of the court in that case that under the law of the District of Columbia, the widow therein (as in the case at bar), who had "renounced the will of her husband and elected to share in his estate as if he had died intestate" (p. 715), was entitled to one-third of the decedent's probate assets *only after* there had been deducted therefrom funeral expenses, debts, claims, and *all administration expenses, including the federal estate taxes*. Furthermore, this holding in *Herson* is in accord with the settled law of the District of Columbia as summarized in 3 Mersch, Probate Court Practice in the District of Columbia (2d ed.), Sec. 2487, which is as follows (p. 7):

§ 2487. *Claims of the United States, D.C. Taxes, Rent, Judgments*

After funeral expenses the fiduciary must next discharge obligations of the decedent due the United States. While Section 3456 R.S.U.S. expresses a preference to the Government over all creditors, that preference has been construed as subject to funeral expenses, on grounds of public policy. Next in order to be paid are

claims of the District of Columbia for taxes; the claim of a landlord for rent in arrears, for which an attachment might be levied at law; and then judgments and decrees of courts of the District of Columbia.¹²

¹² Such law as thus declared by this Court in *Hepburn* and followed in *Herson, supra*, and as summarized by Mersch, *supra*, has also generally been similarly declared and adopted by other courts. For instance, in *In re Glovers' Estate*, 45 Haw. 569, 584, 371 P. 2d 361, 369 (1952), that the court held:

"* * * the federal estate tax is an expense of administration."

Likewise, the Supreme Court of Illinois in *First National Bank of Chicago v. Hart*, 388 Ill. 489, 497, 50 N.E. 461, 464-465 (1943), held:

"This state has no provision in its laws relating to the incidence of the burden of Federal Estate tax and it must therefore fall directly upon the corpus of the estate and be considered an item of expense, such as debts, funeral expenses and the like."

To the same effect see *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 513-514, 101 N.E. 2d 604, 607 (1951); *Lawless v. Lawless*, 17 Ill. App. 2d 481, 490, 150 N.E. 2d 646, 651 (1958).

The Court of Appeals of Maryland in *Weinberg v. Safe Deposit & Trust Co.*, 198 Md. 539, 540, 85 A. 2d 50, 52 (1951), also held:

"The term 'surplus personal estate' as used in Section 314 under which the widow could become entitled to no more than \$2,000 and one-half of the surplus personal estate * * * necessarily is the balance after all expenses of administration and debts, including [federal] taxes, have been paid."

And in *Clarke v. Welden*, 204 Md. 26, 28, 102 A. 2d 560, 561 (1953), it was held:

"The federal estate tax is a deductible item in determining the amount of the distributive share."

The Supreme Court of Maine in *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 145, 163 A. 2d 538, 542 (1960) was of the same view. The court there held:

"The estate is regarded as being instantly depleted to the extent of the [federal estate] tax * * *. It seems certain that there can be no 'residue' for 'distribution' until after the depletion caused by the federal estate tax has occurred, and we are therefore constrained to construe the statutory phrase 'charges of settlement' as broad enough to include the federal estate tax as one of those charges."

Similarly in *Wachovia Bank and Trust Co. v. Green*, 236 N.C. 654, 660, 73 S.E. 2d 877, 883 (1953), the Supreme Court of North Carolina observed:

"The word 'debts' as used in statutes G.S. Sec. 28-105 prescribing the order of their payment would seem to include the federal estate tax."

And in *Campbell v. Lloyd*, 162 Ohio St. 203, 208, 122 N.E. 2d 695, 698 (1954), certiorari denied, 349 U.S. 911, rehearing denied, 349 U.S. 948, the court stated:

"* * * in determining the value of the succession of any * * * beneficiary the amount of the federal estate tax should first be deducted, like other debts and expenses of administration." (Emphasis supplied.)

In *In re Williamson's Estate*, 38 Wash. 2d 259, 267, 229 P. 2d 312, 317 (1951), it was also held:

"The Federal estate tax * * * is payable as an expense of administration."

The observations of the highest court of West Virginia in this connection

D. In view of the absence of any statute or law in the District of Columbia (1) which apportions the decedent's federal estate tax among the beneficiaries of his estate or (2) which exonerates the share of his probate assets, to which his surviving spouse is entitled under her election, from any impact of the federal estate tax, it is obvious that the Congress intended that such tax is to be paid out of decedent's probate assets before any distribution of any portion thereof is made to his surviving spouse

It is the position of the Government that in view of the absence of any statute or law in the District of Columbia (1) which apportions the decedent's federal estate tax among the beneficiaries of his estate or (2) which exonerates the share of his probate assets to which his surviving spouse is entitled under her election from any impact of the federal estate tax, it is obvious that the Congress intended that such tax is to be paid out of decedent's probate assets before any distribution of any portion thereof is made to his surviving spouse.

1. *It is clearly the Congressional purpose and intent that the federal estate tax should be paid by the executor or administrator of a testate or an intestate from the probate assets before making any distribution of the probate assets to beneficiaries under the will or under the descent and distribution statutes, unless such taxes are otherwise provided for in the will or apportioned under a pertinent state statute*

The Internal Revenue Code of 1954 and its precursors expressly provide that such "[federal estate] tax * * * shall be paid by the executor" (Section 2002 of the 1954 Code Appendix, *infra*), and that it is the Congressional "purpose and intent * * * that so far as is practicable and unless otherwise directed by the will of the decedent the [federal estate] tax shall be paid out of the estate *before* its distribution" (emphasis supplied) (Section 2205 of the Internal Revenue Code of 1954), Appendix, *infra*.

The constitutionality of the precursors of these statutes was attacked in *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921).

in *Guaranty National Bank v. Mitchell*, 144 W. Va. 828, 833, 111 S.E. 2d 494, 497 were no different from the others listed above. The court stated:

"Whether, however, the federal estate tax be considered a 'debt,' a 'claim,' or an 'administrative expense' the result is the same. It must * * * be deducted from the whole personal estate of inheritance, before computation of the distributive share of the widow, since no state statute requires a different result."

Likewise, in *In re Uihlein's Will*, 264 Wis. 362, 376, 59 N.W. 2d 641, 648 (1953) the Supreme Court of Wisconsin said:

"Federal estate taxes stand in no different category than do debts or administration expenses."

It was therein contended (p. 349) that if the federal estate "tax [is] attached to the estate before distribution" and "there is an intestacy" it could result in "inequalities in the amounts that beneficiaries might receive in case of estates of different values, of different proportions between real and personal estate, and of different numbers of recipients." In rejecting this quoted contention of the taxpayer in that case, the Supreme Court, in upholding the constitutionality of these provisions, stated (p. 349):

As to the inequalities in case of a will they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition he makes. *As to intestate successors* the tax is not imposed upon them *but precedes* them and the fact that they may receive less or different sums because of the [federal] statute does not concern the United States. (Emphasis supplied.)

This Court incorporated the above quotation into its opinion in *Hepburn, supra*, p. 315, 83 F. 2d, p. 572.

Subsequently, in 1924, the Supreme Court in *Y.M.C.A. v. Davis*, 264 U.S. 47, further clarified and amplified this "purpose and intent" of the Congress in enacting these provisions, stating (p. 50):

Congress was looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries. * * * It said to him [the testator] "if you will make such gifts [which qualify as deductions from gross estate], we'll reduce your death duties and measure them not by your whole estate but by that amount, less what you [so] give." In § 408 [of the Revenue Act of 1918, which was reenacted as section 2205 of the 1954 Code] it is declared to be the intent and purpose of Congress that as far as it is practicable and unless otherwise directed by the testator, *the tax is to be paid out of the estate before distribution*. (Emphasis supplied.)

Eighteen years later, the Supreme Court in *Riggs v. Del Drago*, 317 U.S. 95 (1942), cited with approval *New York Trust Co. v. Eisner, supra*, and *Y.M.C.A. v. Davis, supra*, as well as the decision of this Court in *Hepburn, supra*.

In *Riggs v. Del Drago*, *supra*, in footnote 4, p. 98, the Supreme Court quoted with approval a statement by Congressman Cordell Hull, one of the supporters of Section 208 of the 1916 Act (a precursor of Section 2205 of the 1954 Code quoted above) and its reputed draftsman as follows:

Under the general laws of descent the * * * [federal] estate tax would be *first* taken out of the net estate *before* distribution, and distribution made under the same rule that would otherwise govern it. Where the decedent makes a will * * * he can insert a * * * provision in his will, the effect of which would more or less change the incidence of the [federal estate] tax. (Emphasis supplied.)

And the Supreme Court in *Riggs* further observed (p. 98), as summarized by this Court in *District of Columbia v. Payne*, *supra*, — U.S. App. D.C., p. —, 374 F. 2d, p. 265, fn. 4, that it was the intent and purpose of the Congress that "the federal estate tax should be paid out of the estate as a whole and that the applicable state law as to the devolution of property at death [whether by state statute or by will] should govern the distribution of the remainder and the ultimate impact of the federal estate tax."

In *Riggs* it was contended that the New York apportionment law was "unconstitutional because in conflict with the federal estate tax law" (p. 96). The constitutionality of this New York apportionment law, which "provides in effect that except as otherwise directed by the decedent's will, the burden of any federal death taxes shall be spread proportionately among the distributees or beneficiaries of the estate" (p. 98), was in *Riggs* sustained by the Supreme Court. It held (p. 102):

Since ¶ 124 of the New York decedent estate law is not in conflict with the federal estate tax statute, it does not contravene the supremacy clause of the Constitution. Nor does the fact that the ultimate incidence of the federal estate tax is governed by state law violate the requirement of geographical uniformity.

Such is the limited, restricted and narrow holding of the Supreme Court in *Riggs*. "It did not undertake in any manner to specify who was to bear the burden of tax." *Weinberg v. Safe*

Dep. & Trust Co., 198 Md. 539, 545, 85 A. 2d 50, 52 (1951). It did not in any wise defeat the application of the statutes of descent and distribution of the District of Columbia. It did not in any wise relieve the interest which beneficiaries received in the probate assets of a decedent or intestate from bearing its share of the federal estate tax.¹³

It is incontrovertible, as stated in *Herson, supra*, p. 715, that there is "no express provision * * * in any law of this jurisdiction [District of Columbia] * * * which apportions the federal estate tax among beneficiaries of a decedent's estate or exempts the widow's [surviving spouse's] share from liability" when she elects to take her share of a decedent's probate assets under the statutes of descent and distribution of the District of Columbia by renouncing the will of her deceased spouse. Moreover, this Court in *District of Columbia v. Payne, supra*, unequivocally stated that under the rule in *Riggs*, App. D.C., p. —, 374 F. 2d, p. 265, "If Congress had intended to allow apportionment, it could easily have done so". (Emphasis supplied). It is horn-book law that the Congress, which enacts the statutes of the District of Columbia, "has the power to enact an apportionment of federal estate tax statute providing for a different method of bearing the impact of federal estate taxes if it should determine the same desirable." *In re Uihlein's Will*, 264 Wis. 362, 376, 59 N.W. 2d 641, 648 (1963). It is clear from the foregoing that the Congress, in its role as the custodian of the public policy of the District of Columbia, has chosen *not* to enact any statute which would apportion the federal estate tax among the beneficiaries who share in the probate assets of a decedent either under the provisions of his will or by virtue of the statutes of descent or distribution.

¹³ See *District of Columbia v. Payne*, — App. D.C. —, —, 374 F. 2d 261, 265, fn. 4 (1966); *In re Tarver's Estate*, 255 F. 2d 913, 917 (C.A. 4th 1958); *Merchants National Bank & Trust Co. v. United States*, 246 F. 2d 410, 412-413 (C.A. 7th 1957); *Thompson v. Wiseman*, 233 F. 2d 734, 737 C.A. 10th 1956; *Hughes v. Sun Life Assur. Co. of Canada*, 159 F. 2d 110, 113-114 (C.A. 7th 1946); *Rogan v. Taylor*, 136 F. 2d 598, 599, 599-560 (C.A. 9th 1943); *Guaranty National Bank v. Mitchell*, 144 W. Va. 828, 832, 111 S. E. 2d 494, 496 (1959); *In re Rettenmeyer's Estate*, 345 P. 2d 872, 880 (Okla. 1959); *In re Uihlein's Will*, 264 Wisc. 362, 373, 59 N.W. 2d 641, 646-647 (1953);

2. *It is the province of the Congress, which enacts the statutes of the District of Columbia, to determine whether it should be the public policy of the District that a widow who renounces the will of her deceased husband and elects in lieu thereof to take her share of the husband's probate assets under the statutes of descent and distribution should receive her portion of these probate assets free from any impact of the federal estate tax*

It is the position of the Government that it is the province of the Congress, which enacts the statutes of the District of Columbia, to determine whether it should be the public policy of the District that a widow who renounces the will of her deceased husband and elects in lieu thereof to take her share of the husband's probate assets under the statutes of descent and distribution should receive her portion of these probate assets free from any impact of the federal estate tax.

In *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 148, 163 A. 2d 538, 544 (1960), the Supreme Court of Maine in referring to a legislative determination of public policy in a parallel situation said:

We think that whether or not a surviving spouse who elects to renounce a will should be wholly or partly relieved of the burden of federal estate tax is a matter of public policy which should be left to legislative determination. *Wachovia Bank & Trust Co. v. Green*, 1953, 236 N.C. 654, 73 S.E. 2d 879; *In re Uihlein's Will*, *supra*; *Weinberg v. Safe Deposit & Trust Co.*, *supra*.

Moreover, in *Weinberg v. Safe Deposit & Trust Co.*, 198 Md. 539, 549, 85 A. 2d 50, 54 (1951), which also involved the renunciation by a surviving wife of the will of the deceased husband, the court observed:

* * * we [courts] cannot substitute considerations of fairness and equity for definite legislative directions on matters entirely under legislative control. If the legislature finds that the present law produces general unfairness (about which we express no opinion) it can always change the statute, but unless and until it does, we can only interpret the law according to its plain intent and meaning.

The Court of Appeals for the Seventh Circuit adopted a similar approach in *Hughes v. Sun Life Assur Co. of Canada*, 159 F. 2d 110 (1946), stating (p. 114):

Illinois has no provision in its laws relating to the incidence of the burden of the federal tax * * *. In the absence of statutory enactment directing otherwise, the federal tax must be considered as a charge against the whole estate.

To the same effect see *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 513, 101 N.E. 2d 604, 607 (1951); *Thompson v. Wiseman*, 233 F. 2d 734, 739 (C.A. 10th 1956); *Knowles v. National Bank of Detroit*, 345 Mich. 671, 76 N.W. 2d 813 (1956). In *Knowles, supra*, the Supreme Court of Michigan, in applying these well established principles, stated (345 Mich., pp. 678-679, 76 N.W. 2d, p. 817):

In the absence of a proration statute in this State, and in the absence of a contrary intention expressed by the testatrix in paragraph 6 of her will, the burden of the Federal estate taxes must fall upon the residuary estate. As in the *Moorman* case [involving a surviving spouse's disavowal of a decedent's will], in the absence of statute, we decline to follow the equitable proration doctrine urged by the plaintiff-appellant in the instant case.

* * * whether this State shall adopt the so-called equitable doctrine of proration of federal estate taxes is a matter for the legislature, not for the court, to put into law. According to the record, some 23 states have passed proration laws. Michigan has not.¹⁴

Taxpayer concedes (Br. 22-23) that subsequent (1) to the decision by the Supreme Court in *Riggs* and (2) to the enactment by the Congress of the marital deduction provision in 1948, the principles set forth above have been followed and applied by five different states in cases on all fours with the instant case in which the surviving spouse had renounced the devises and bequests made to her under her husband's will and had elected to take in lieu thereof her legal share of the probate

¹⁴ As set forth in Appendix, *infra* pp. 76-78, at present, some twenty-nine states have now passed a variety of different and inconsistent apportionment statutes, but as noted above and, as stated by this Court in *Herson, supra*, p. 715, there is "no express provision * * * in any law of this jurisdiction [District of Columbia] * * * which apportions the federal estate tax among beneficiaries of a decedent's estate or exempts the widow's [surviving spouse's] share of liability."

assets, to wit: *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 163 A. 2d 538 (1960); *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E. 2d 695 (1954); *In re Uihlein's Will*, 264 Wisc. 362, 59 S.W. 2d 641 (1953); *Wachovia Bank and Trust Co. v. Green*, 235 N.C. 654, 73 S.E. 2d 879 (1953); *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 101 N.E. 2d (1951). However, in addition to these five states, there are cases in four additional states and two United States Courts of Appeals which have also refused by judicial fiat to create an apportionment rule which would exonerate the surviving spouse's share in the deceased spouse's distributable probate assets from any federal estate taxes after she had renounced the deceased spouse's will. These cases in the state courts are: *In re Glovers' Estate*, 45 Haw. 569, 371 P. 2d 361 (1962); *Guaranty National Bank v. Mitchell*, 144 W. Va. 845, 111 S.E. 2d 494 (1959); *Moorman v. Moorman*, 340 Mich. 636, 66 N.W. 2d 248 (1954); *Weinberg v. Safe Dep. & Trust Co.*, 198 Md. 539, 85 A. 2d 50 (1951). The two cases in the United States Courts of Appeals are *Merchants National Bank & Trust Co. v. United States*, 246 F. 2d 410 (C.A. 7th 1957); and *Thompson v. Wiseman*, 233 F. 2d 734 (C.A. 10th 1956). The decisions in the two latter cases were governed by the laws of Indiana and Oklahoma, respectively.

Taxpayer in effect further concedes (Br. 15) that this Court in *Hepburn*, *supra*, and the District Court for the District of Columbia in *Herson*, *supra*, and in the instant case, because of the absence of "any contrary direction in the will" and the absence of any apportionment statute "have adopted a rule against apportionment for the District of Columbia requiring * * * the payment of the full estate tax out of the residuary personal estate." (Emphasis supplied.) However, taxpayer contends that this Court should now reverse its decision in *Hepburn* and should reject the law as applied in *Herson* and in the instant case. It urges that this Court, notwithstanding the eleven cases cited in the previous paragraph, should by judicial fiat create and adopt an apportionment rule which will "permit [the] reaching of the result herein contended for" by taxpayer, including a reversal of the judgment of the court below. (Br. 7.)

One of the grounds urged by taxpayer in support of this contention, which we submit is totally devoid of any merit, is that the "adoption of such rule by this Court will further accomplish the desirable end of avoiding conflict in marital property

rights with the neighboring states of Virginia and Maryland." (Br. 6) in that "the law of Maryland (and Virginia) * * * provides for the full exoneration of property passing to a surviving spouse which qualifies for the marital deduction (Br. 33). The basic fallacy of this ground advanced by the taxpayer is readily apparent. Neither the courts of Maryland nor the courts of Virginia have by judicial fiat created and adopted a rule to apportion federal estate taxes. These are the indisputable facts: Maryland and Virginia have obtained an apportionment rule for federal estate taxes only after many tortuous sessions in successive legislatures covering a period of about twenty-eight years.¹⁵

As already pointed out, the Congress, notwithstanding the decision of the Supreme Court in *Riggs* in 1942 and the enactment by the Congress of the marital deduction in 1948, has steadfastly refused to adopt any statute for the District of Columbia which would apportion federal estate taxes in the same manner as have the Maryland and Virginia statutes.

Nor, we respectfully submit, does "the recommendation made in 1958 by the National Conference of Commissioners on Uniform State Laws that a Uniform Estate Tax Apportionment Act be adopted by all of the states" (Br. 22), warrant or authorize this Court, under our doctrine of separation of powers, by judicial fiat to create and adopt a rule of apportionment of federal estate taxes solely by reason of the failure of the Congress to so act or comply with this recommendation of the National Conference on Uniform Laws. Moreover, it appears that only one state, North Dakota, has up to 1967, adopted the Uniform Estate Tax Apportionment Act. (Appendix C to Taxpayer's Br., p. 25.)

Furthermore, while twenty-nine states have adopted apportionment statutes (Appendix C to Taxpayer's Br., pp. 17-30), it is incontrovertible that these apportionment statutes differ from each other in many material respects. Moreover, some of them expressly refused to enact a rule of apportionment which provides that "the surviving spouse, in the case of intestacy or election against the will of a testate decedent, should take his or her statutory share free of any estate tax," as tax-

¹⁵ See Appendix, *infra*, pp. 75-76.

payer urges this Court to adopt by judicial fiat (Br. 24). There are material differences and inconsistencies in these various statutes which had been adopted by these twenty-nine states.¹⁶

Therefore, in view of the absence of any statute or law in the District of Columbia (1) which apportions the decedent's federal estate tax among the beneficiaries of his estate or (2) which exonerates the share of his probate assets to which his surviving spouse is entitled under her election from any impact of the federal estate tax, it is respectfully submitted that it is obvious that the Congress in its role as the legislative body for the District intended that such tax is to be paid out of decedent's probate assets *before* any distribution of any portion thereof is made to his surviving spouse.

E. It is the intention of the Congress acting in its role as the legislative body for the District of Columbia, whenever a decedent domiciled in the District of Columbia is survived by a spouse and a child, and that spouse disavows his will and elects to take her legal share of his probate assets, then such surviving spouse is entitled to receive only one-third of the balance or surplus of these assets, remaining after the deduction therefrom of funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes

As we will develop below, it is also clear that the Congress in its role as the legislative body for the District intended that whenever a decedent domiciled in the District of Columbia is survived by a spouse and a child and his spouse disavows his will and elects to take her legal share of his probate assets, then such surviving spouse is entitled to receive only one-third of the *balance or surplus* of these assets, remaining after the deduction therefrom of funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes.

1. *The term "surplus" of an intestate's probate assets which is distributable under the descent and distribution statutes of the District of Columbia as amended on September 14, 1961, and as re-enacted on September 14, 1965, means the balance of the intestate's probate assets remaining after deducting therefrom the intestate's funeral expenses, debts, claims against him, and all expenses incurred in the administration of his estate, including federal and District of Columbia estate taxes*

As expressly set forth in the Report of the House of Representatives which accompanied the bill which on August 31,

¹⁶ See Appendix, *infra*, pp. 76-78.

1957, amended Section 18-101 of the District of Columbia Code (1951 ed.), it was the intent of the Congress to "abolish all present distinctions as between the order of succession in the descent of real property and the distribution of personal property of an intestate" and to provide "that real property shall descend in the same order as personal property, under present law, is distributed * * * [and thus] provide for uniformity in succession of real and personal property" which "Makes realty descend exactly as personalty now does, including the share to spouse." H. Rep. No. 304, 85th Cong., 1st Sess., p. 2 (Appendix, *infra*).

As further disclosed in H. Rep. No. 304, 85th Cong., 1st Sess., p. 4, it was also the intent of the Congress in the same bill to amend Sections 18-210 and 18-211 of the District of Columbia Code (1951) to empower "every surviving spouse (widow or widower), who is given anything under the will of the deceased spouse, [to] renounce if he or she prefers to take her or his intestate share" thereby to vest in "either spouse statutory rights in real and personal property by renunciation" and accordingly "by renouncing [the will] either spouse surviving (widow or widower) can take her or his full statutory share of the real or personal property of the deceased spouse" as provided in Sections 18-701, 18-702, 18-703, and 18-704 of the District of Columbia Code (1951 ed.).

It is incontrovertible, therefore, that, as a result of this 1957 amendment, the term "surplus" in Sections 18-701, 18-702, 18-703, and 18-704 of the District of Columbia Code (1951 ed.) now applied not only to the "surplus" personal estate of the decedent but also to his "surplus" probate estate, which included his personal *and* his real property.¹⁷ These provisions were codified in the District of Columbia Code (1961 ed.).

¹⁷ Nevertheless, as we have shown in Subdivision D(1) of our brief, *supra*, it is still the law of the District of Columbia, as it is plainly set forth in Sections 18-101 and 18-211 of the 1961 Code as amended on September 14, 1961, Appendix, *infra*, read *in pari materia*, that, upon renunciation of the will by the surviving spouse, the personal estate of the decedent is nonetheless first called upon "for payment of the intestate's [decedent's] funeral expenses, debts, costs of administration, and estate, inheritance and succession taxes." This, too, is plain. It is only "in the event of insufficiency of the personal estate" for such payments, that the real property of the decedent is called upon for such payments "in the same manner and to the same extent

The ancestral statute of the descent and distribution statutes of the District of Columbia is found in the Maryland Act of 1789, c. 101, subc. XI.¹⁸ Therein we first find the term "surplus", written into the statute. These provisions of the Maryland Act were in effect followed in the District of Columbia prior to and subsequent to the enactment of the 1901 Code of laws of the District of Columbia,¹⁹ except that in 1957, the "surplus" embodied both the personal and real property of the intestate. Consequently, the court below correctly observed that "This phraseology about *surplus* has been in there for some time and laws have been passed since then." (Emphasis supplied.) (JA 49.) As we have shown above, the term "surplus" in the District of Columbia applied to the personal estate of the intestate until 1957. Thereafter it also applied to his real property.

Furthermore, the Congress on September 14, 1965, in enacting the Act of September 14, 1965, P.L. 89-183, 79 Stat. 685, Sec. 1 which codified "the general and permanent laws relating to decedents' estates and fiduciary relations in the District of Columbia", re-enacted Section 18-101 as Section 19-301, Sections 18-702, 18-703, and 18-704 as Sections 19-302, 19-303, and 19-304, and Section 18-701 as Section 20-1901. The term "surplus" was again written into each of these sections, indisputably without any attempt in anywise to change the meaning of that term, even though it then applied to both real and personal probate assets of the intestate. That such was the intent of the Congress readily appears in S. Rep. No. 612, 89th Cong., 1st Sess. (Appendix, *infra*), which accompanied the bill enacted as the Act of September 14, 1965, *supra*, and which

as the personal estate of the intestate." This Court has, of course, so held in *Hepburn v. Winthrop*, *supra*, pp. 316, 316, 83 F. 2d, pp. 572, 573, and in *Vogel v. Saunders*, 63 App. D.C. 31, 34-35, 92 F. 2d 984, 987-988 (1937).

¹⁸ Maryland Act of 1789, c. 101, subc. XI, as herein pertinent, provides:

"Where all the debts of an intestate, exhibited and proved, or notified and not barred, shall have been discharged, or settled and allowed to be retained, as herein directed, the administrator shall proceed to make distribution of the *surplus* as follows:

* * * * *

"Sec. 2. If there be a widow, and a child or children, or a descendant or descendants from a child, the widow shall have one-third only." (Emphasis supplied.)

¹⁹ 10 District of Columbia Code Encyclopedia Annotated, p. 151.

codified "the general and permanent laws relating to decedents' estates." Therein the intent of the Congress is expressed as follows (p. 3):

The primary purpose of this revision is to substitute plain language for awkward terms, reconciliation of conflicting law, omission of obsolete, superseded, or repealed sections, consolidation of similar provisions, and improvement in the style and arrangement of the material.

It is not the purpose to make substantive changes in the law. While, in a few sections, changes have been made which might at first comparison be considered "substantive," actually it is intended to reflect in those changes only what apparently was the legislative intent, or is implied in the provisions themselves, or *has been stated by the courts in construing the sections.* (Emphasis supplied.)

As we have indicated above, Sections 19-301 and 19-303 of the District of Columbia Code (1961 ed., Supp. V) as enacted on September 14, 1965, are substantially the same as Sections 18-101 and 18-703 of District of Columbia Code (1961 ed., Supp. IV). Section 19-301 as pertinent, provides:

(a) The real estate * * * and the surplus of the [his] personal estate * * * shall be distributed, to the surviving spouse, children, and other persons in the manner provided by this chapter. The heirs specified by this subsection take the real estate as tenants in common in the same proportions as they take the surplus personal estate as provided by this chapter.

(b) * * * the real estate specified by subsection (a) of this section is *liable*, where the personal estate is insufficient, *for the payment of the* intestate's funeral expenses, debts, costs of administration, and *estate* * * * taxes in the same manner and to the same extent as the personal estate of the intestate * * *. (Emphasis supplied.)

Section 19-303, as herein pertinent, also provides:

When the intestate leaves a surviving spouse and child * * * the surviving spouse is entitled to one-third.

It is the position of the Government, adopting the language of S. Rep. No. 612, 89th Cong., 1st Sess., p. 3, that (1) "[it] was the legislative intent," (2) "[it] is implied in the provisions themselves," and (3) "[it] has been stated by the courts in construing the sections" that one-third of the "surplus" to which decedent's surviving spouse was entitled under Section 18-703 of the 1961 District of Columbia Code prior to the 1965 amendment thereto (which is identical with Section 19-303 of the 1961 Code subsequent to the 1965 amendment) is one-third of the *balance* of decedent's probate estate remaining after deducting therefrom the "funeral expenses, debts, costs of administration and estate * * * taxes." That such "was the legislative intent" and was "implied in the provisions [statutes] themselves" we will demonstrate in Subsection E(1) (a) and (b) of our brief, *infra*.

(a) *The Congress in amending Section 18-211 of the District of Columbia Code (1961 ed.) on September 14, 1961, manifested its intention that the meaning of surplus probate assets which has always appeared in the District of Columbia Code is identical with the meaning of net probate assets of a decedent or intestate*

The decedent died on August 17, 1963. (JA 14.) Consequently, Section 18-211 of the District of Columbia Code (1961 ed., Supp. IV), as amended by Sec. 4, Marital Property Rights Amendment of 1961, P.L. 87-246, 75 Stat. 515, Appendix, *infra*, on September 14, 1961, are herein applicable.

As thus amended, Section 18-211 provides in paragraph (a) thereof that a surviving spouse of a decedent may, "within six months after the will of the deceased spouse is admitted to probate * * * file in the probate court a written renunciation", and may "renounce and quit all claim to any devise or bequest made to me [her] by the last will of my [her] husband * * * exhibited and proved according to law; and * * * elect to take in lieu thereof my [her] legal share of the real and personal property of my [her] said spouse." In the instant case the surviving spouse in accordance with this provision timely filed on November 1, 1963, such renunciation and election. (JA 46.)

Section 18-211, as thus amended, further provides in paragraph (e) thereof, as herein pertinent—

By renouncing all claim to any and all devises and bequests made to her * * * by the will of the husband * * * the surviving spouse shall be entitled to such share or interest in the real and personal estate of the deceased spouse * * * which she * * * would have taken had the deceased spouse died intestate, except that in * * * [no] event shall the surviving spouse be entitled to more than one-half of the *net* estate bequeathed and devised by said will * * *. (Emphasis supplied.)

H. Rep. No. 679, 87th Cong., 1st Sess., Appendix, *infra*, which accompanied the bill which was enacted as the "Marital Property Rights Amendments of 1961", states (pp. 1-2):

The 1957 act [including Section 18-211 thereof, which was amended in 1961] established a uniform succession to real and personal property by providing that real estate should descend to the decedent's spouse and kindred in the same manner as the personal estate, i.e., that on intestacy the same persons take the real estate, and in the same shares, as they are entitled to the *surplus personal property* according to the statutes of distribution now or hereafter controlling. (Emphasis supplied.)

The 1961 amendment quoted in the penultimate paragraph expressly limited and restricted the surviving spouse's share of decedent's probate assets (real and personal) to one-half of the surplus of decedent's probate assets and it characterized such "surplus" as "one-half of the *net* estate bequeathed and devised by said [decedent's] will." (Emphasis supplied.)

The Congress in thus limiting and restricting the widow's share in the *surplus* or *net* probate assets of the decedent, whenever she disavows the decedent's will and elects to take in lieu thereof her legal share of his probate assets, in H. Rep. No. 679, 87th Cong., 1st Sess., stated its reason therefor, as follows (p. 2):

Under the law as it now stands, a wife owning substantial real property of her own, and having no relatives closer than nephews and nieces, cannot make a will which will be effective and certain to dispose of

any part of her estate other than to her husband *because if he survives her he can renounce the will and take her entire estate.* (Emphasis supplied.)

It further elaborated upon its reason as follows (p. 4):

* * * [the amendment] provides a limitation on the share the surviving spouse filing a renunciation can receive in derogation of the will. There has been substantial criticism of the present law in that, on renunciation, the surviving spouse can in the circumstances of no relatives closer than nephews and nieces take the entire estate of the deceased spouse and wholly defeat the testator's intentions. The bill limits the renouncing spouse to one-half of the *net* estate * * *. (Emphasis supplied.)

To understand more fully the reasons of the Congress as thus incorporated in the above quotations from H. Rep. No. 679, *supra*, we shall set forth Sections 18-701 and 18-702, District of Columbia Code (1961 ed.), Appendix, *infra*, which were last amended on April 19, 1920, and which were effective as of the date of decedent's death.

Section 18-701 of the District of Columbia Code (1961 ed.) provides:

Distribution—When to be made.

When the debts of an intestate, exhibited and proved or notified and not barred, shall have been discharged or settled, or allowed to be retained as herein directed, the administrator shall proceed to make distribution of the surplus as provided in this chapter.

Section 18-702 of the 1961 District of Columbia Code (1961 ed.), further provides:

When surviving spouse entitled to whole.

If the intestate leave a widow or surviving husband and no child, parent, grandchild, brother, or sister, or the child of a brother or sister of the said intestate, the said widow or surviving husband shall be entitled to the whole [of the surplus personal property].

It is plain that, without such limitation written into the 1961 amendment to Section 18-211, a widow by disavowing the decedent's will, in the event the decedent had no relatives closer than nephews and nieces surviving him, would pursuant to

Section 18-702 of the 1961 Code "be entitled to the whole" *surplus* or *net* probate assets of the decedent.

An examination of H. Rep. No. 679, 87th Cong., 1st Sess., *supra*, further discloses that the Congress in this 1961 amendment did not in any wise attempt to limit or restrict the share of the *surplus* probate assets of a decedent which is distributable to a widow who had disavowed his will and which she would be entitled to receive under the circumstances outlined in Section 18-704 of the 1961 District of Columbia Code (set forth below) which had been last amended on April 19, 1920. Under this section, if the decedent is also survived by other specified heirs and relatives, his widow who had renounced his will would incontrovertibly be entitled to one-half of the *surplus* probate assets of the decedent. Section 18-704 Appendix, *infra*, provides:

When surviving spouse entitled to one-half.

If there be a widow or surviving husband and no child or descendants of the intestate, but the said intestate shall leave a father or mother, a brother or sister, or child of a brother or sister, the widow or surviving husband shall take one-half [of the *surplus* personal property].

It is, however, no inadvertence or accident that no reference is made in H. Rep. No. 679, 87th Cong., 1st Sess., *supra*, to the provisions of Section 18-704 of the District of Columbia Code (1961 ed.). The reason therefor is clear. Under Section 18-704 and the facts therein delineated, it is indisputable that the widow who had renounced her husband's will would be entitled to one-half of the *surplus* probate assets of her husband. And, as we have already shown, the Congress, by its characterization in its 1961 amendment of Section 18-211 of *surplus* probate assets as *net* probate assets, plainly intended that the term "surplus" as used in chapter 7, entitled "Distribution of Surplus," which include Sections 18-701, 18-702, 18-703 and 18-704 as applied to probate assets is identical with the term "net" as therein applied to probate assets.

In harmony with such intention of the Congress, under the facts in the case at bar, namely, that the decedent was survived by his wife and a son, it is indisputable that the distributable share of a widow who had disavowed her husband's will is, under Section 18-703 of the District of Columbia Code (1961 ed.), restricted only to one-third of the *surplus* of decedent's *surplus* probate assets. Section 18-703 provides:

When surviving spouse entitled to one-third.

If there be a widow * * * and a child or children, or a descendant or descendants from a child, the widow * * * shall have one-third only [of the surplus probate assets of decedent].

And the one-third of the *surplus* probate assets, for the reasons hereinabove set forth, we respectfully submit, is identical with one third of the *net* probate assets of decedent.

(b) *The Congress in amending Section 18-101 of the District of Columbia Code (1961 ed.) on September 14, 1961, manifested its intention that surplus probate assets or net probate assets, which are indistinguishable under the descent and distribution statutes, are only the probate assets of the intestate remaining after deducting therefrom funeral expenses, debts, claims and all expenses of administration, including federal and District of Columbia estate taxes*

As amended on September 14, 1961, Section 18-101 of the District of Columbia Code (1961 ed.) provides:

Course of descents generally.

On the death of any person seized of or entitled to an interest in an estate in lands * * * in the District of Columbia, and intestate thereof, the same shall descend in fee simple to such person's surviving spouse, if any, and kindred, who according to the laws of the District of Columbia now or hereafter in force relating to the distribution of the personal property of intestates, would be entitled to the *surplus personal property* of such intestate, if he * * * had died a resident of the District of Columbia and possessed of such *surplus personalty*; and such surviving spouse and kindred shall take as tenants in common in the *same proportions* as are or shall be fixed by such laws relating to personal property * * *. * * * [Furthermore] such real property shall be liable, in the event of insufficiency of personal property, for the payment of the intestate's *funeral expenses, debts, costs of administration, and estate, inheritance, and succession taxes in the same manner and to the same extent as the personal property of such intestate.* (Emphasis supplied.)

H. Rep. No. 679, 87th Cong., 1st Sess., *supra*, p. 3, in commenting on Section 18-101 as amended in 1961, states that it—

is substantially the same as in the 1957 law. It establishes a uniform succession of both real and personal property, *but expressly provides for the payment of debts, administration expenses and taxes out of the decedent's real property if there is a deficiency of personal property.* (Emphasis supplied.)

It is apparent that this 1961 amendment to Section 18-101 of the District of Columbia Code (1961 ed.) is in effect a Congressional statutory enactment which approves the rule in *Hepburn*, *supra*, as declared by this Court, to the effect that federal estate taxes must be paid out of the personal property of the decedent, and if the personal property is insufficient to pay the federal estate taxes, then and only then would the real property of the decedent be called upon to pay the federal estate tax.²⁰

Therefore, it is respectfully submitted that the Congress in amending Section 18-101 of the District of Columbia Code (1961 ed.) on September 14, 1961, manifested its intention that *surplus* probate assets or *net* probate assets, which are indistinguishable under the descent and distribution statutes, are only the probate assets of the intestate remaining after deducting therefrom funeral expenses, debts, claims and all expenses of administration, including federal and District of Columbia estate taxes.

(c) *The courts which have had the occasion to construe the term "surplus" as it is incorporated in the statutes of descent and distribution have consistently held, in accord with the intent of the Congress, that surplus probate assets of an intestate which are distributable under those statutes means*

²⁰ This Court in *Hepburn*, in affirming the lower court on this issue, expressly rejected the contention of the taxpayer in that case to the effect that the federal estate taxes should be apportioned between the personal and real property, stating (63 U.S. App. D.C., p. 316, 83 F. 2d, p. 573):

"* * * in the absence of any provision in the will directing a contribution from the real estate and in the absence of a local statute on the subject, it is clear that the payment of the [federal estate] tax out of the personal residuary estate was, like the payment of debts, an expense of administration; and, as to it, the decision of the lower court should be approved." (Emphasis supplied.)

only the probate assets of the decedent remaining after deducting therefrom funeral expenses, debts, claims and all expenses of administration, including federal estate taxes

Herson v. Mills, 221 F. Supp. 714 (D.C.D.C. 1963), as already pointed out, is on all fours with the case at bar. In sustaining the contention of the defendant in that case, to wit, "that the amount of the widow's statutory one-third share is to be computed *after* deducting from the decedent's estate the whole of the federal estate tax" (p. 715) (emphasis supplied), that court held (p. 716):

The federal estate tax being in the nature of an administration expense is taken from the estate *before* the property is set off to the beneficiaries. The tax is not a payment as to which the beneficiaries have any concern as it is a charge against the estate and not the legatees or distributees. *Hepburn v. Winthrop*, 65 App. D.C. 309, 83 F. 2d 566. (Emphasis supplied.)

This Court in *Hepburn*, *supra*, held (65 U.S. App. D.C., p. 315, 83 F. 2d, p. 572):

Section 407 of the act [Revenue Act of 1918] declares that the [federal estate] tax is to be paid by the executor *before* distribution. This implies that the tax is of the nature of an administration expense. It is to be paid in money out of any available funds, or, if there be none, by converting property into money for the purpose. * * * It is taken from the estate *before* the property is set off to the beneficiaries. It is therefore not a payment as to which the beneficiaries have any concern. It is not a charge against either legatees or distributees.

The identical issue herein presented to this Court for decision has, in effect, been decided in harmony with the holding in *Herson* and *Hepburn* by the Court of Appeals of Maryland in *Weinberg v. Safe Dep. & Trust Co.*, 198 Md. 539, 85 A. 2d 50 (1951). In *Weinberg*, *supra*, that court construed the term "surplus", which, as set forth in footnote 18, *supra*, appears in the Maryland Act of 1798, c. 101, subc. XI, and which was re-enacted in the provisions of the Code of Maryland construed in *Weinberg*, as well as in the current 1957 Code of Maryland. In *Weinberg* the Court of Appeals of Maryland held (198 Md., p. 546, 85 A. 2d, p. 52):

Where a spouse renounces * * * [the] bequests given [to her] under such will * * * [she] cannot become entitled to more than \$2,000.00 and one-half of the surplus personal estate remaining. The term "surplus personal estate" has been defined as meaning the entire balance, principal and income at the time of distribution, *Gardner v. Mercantile Trust Co.*, 164 Md. 280, 283, 164 A. 663, which necessarily is the balance after all expenses of administration and debts, including taxes, have been paid. Article 93, Secs. 5, 123 and 127. *Mercantile Trust Co. v. Schloss*, 165 Md. 18, 31, 166 A. 599. *Marriott v. Marriott*, 175 Md. 567, 571, 3 A. 2d 493.

Under the law of Maryland (*Clarke v. Welden*, 204 Md. 26, 29, 102 A. 2d 560, 561 (1954)), as under the law of the District of Columbia, the federal estate "tax is payable * * * as a debt of the estate or an expense of administration. *Y.M.C.A. v. Davis*, 264 U.S. 47; *Hepburn v. Winthrop* [65 App. D.C. 309], 83 F. 2d 566."

In 1902 the Court of Appeals of Maryland decided *Hunter v. Hersperger*, 96 Md. 292, 54 A. 65, which involved the quantum of the distributable share of the personal assets of the intestate labelled as "surplus". In its ruling in that case, which was handed down nearly fifty years prior to its decision in *Weinberg*, and manifestly prior to the enactment of the Federal Estate Tax Act in 1916, the court defined "surplus" as follows (96 Md., pp. 295-296, 54 A., p. 67):

* * * surplus * * * means that part of the estate [of the intestate] * * * [a]fter the debts and expenses connected with the administration are ascertained [and thereafter], the surplus should be distributed.

Hence, if there had been a federal estate tax in 1902 which provided that a lien for federal estate taxes is impressed upon the intestate's gross estate at his death, *Hunter v. Hersperger*, *supra*, under the teaching of *Clarke v. Welden*, *supra*, and *Weinberg*, *supra*, would have treated the federal estate tax "as a debt of the estate or an expense of administration," and it appears plain, that such federal estate taxes would also have been deducted from the probate assets of the intestate before determining the distributable surplus under the descent and distribution statutes. In view of the virtual identity since 1789 of the herein applicable provisions of the laws of Maryland and

the District of Columbia involving the use of the term "surplus," these decisions of Maryland, while not binding on this Court, should, we respectfully submit, be persuasive in the case at bar under the teaching of this Court in *Watkins v. Rives*, 75 U.S. App. D.C. 109, 111, 125 F. 2d 33, 35 (1941).²¹

We will presently show that this Court has also consistently so construed the term "surplus" as did the Court of Appeals of Maryland both prior to and subsequent to the enactment of the District of Columbia Code of 1901.

Keeping in mind that it is the settled law as declared by this Court that the federal estate tax "is of the nature of an administration expense" and that "It is taken from the estate before the property is set off to the beneficiaries" (*Hepburn v. Winthrop, supra*, 65 U.S. App. D.C., p. 315, 83 F. 2d, p. 572), it should be pointed out that this Court, even prior to the enactment of the District of Columbia Code of 1901, in *Glenn v. Sothoron*, 4 App. D.C. 125 (1894), stated (p. 135): "Legatees and distributees * * * are not entitled to anything except the surplus of the assets after all debts are paid." Furthermore, this Court in *Wiggins v. Mayer*, 57 App. D.C. 293, 22 F. 2d 869 (1927), which involved the distribution of the "surplus" under the descent and distribution statutes, held (57 App. D.C., p. 294, 22 F. 2d, p. 870):

There can be no true "surplus" for distribution among beneficiaries until after the satisfaction of all lawful debts of the estate.

A lawful administration of the estate requires that the assets shall be applied to the payment of all decedent's lawful debts, before any part thereof shall go to anyone by inheritance.

In *Condon v. Mallan*, 58 App. D.C. 371, 30 F. 2d 995 (1929), this Court, in construing a precursor of Section 18-704 of the District of Columbia Code (1961 ed.), equated "surplus" with "balance," stating (58 App. D.C., p. 372, 30 F. 2d 995, 996):

²¹ In *Watkins, supra*, this Court stated (75 U.S. App. D.C., p. 111, 125 F. 2d, p. 35):

"Although Maryland statutes and Maryland decisions of later date than 1801 do not constitute the law of the District of Columbia, nevertheless, this court has, customarily, looked to later decisions of the Court of Appeals of Maryland for assistance, not merely in interpreting the law which was inherited from that State, but also in interpreting later statutes of the District which are the same or closely similar to those of Maryland."

After payment of the expenses of *administering* the estate, one half of the *balance* of the fund should be distributed to the daughter of the deceased widow.

See also *Randall v. Bockhorst*, 98 U.S. App. D.C. 77, 232 F. 2d 334 (1956), in which this Court held (98 U.S. App. D.C., p. 80, fn. 5, 232 F. 2d, p. 337, fn. 5): "Under the Code provisions governing descent and distribution the widow takes one-half of the *surplus remaining* after payment of debts * * *." (Emphasis supplied.) In *Joyce v. Scott*, 105 U.S. App. D.C. 177, 179 265 F. 2d 368, 371 (1959), this Court also held that the intestate's "assets must first respond to the claims of creditors" and that "under the District of Columbia Code [Section 18-703 (1951 ed.)], the widow will receive *only* one-third of any *balance* [of the intestate's assets] *remaining*." (Emphasis supplied.) Such settled law, as herein pertinent, variously declared by this Court, was summarized in 10 District of Columbia Code Encyclopedia Annotated (1967) as follows (p. 259): "there can be no true 'surplus' for distribution among beneficiaries until after the satisfaction of all lawful debts of the decedent". See also the summarization in 1 Mersch, Probate Court Practice in the District of Columbia (2d ed.), which is as follows (p. 131):

The surplus, after satisfaction of administration expenses, the decedent's debts, and just claims against the personal representative, including funeral expenses allowed by the court, goes to the spouse and other distributees * * *.

Furthermore, the interpretation of the term "surplus" in descent and distribution statutes by the courts of the District of Columbia and Maryland is in harmony with the construction of such term by other courts which have had the occasion to construe it in the descent and distribution statutes of their respective states.

In *Kennedy v. Kennedy*, 97 W. Va. 491, 125 S.E. 337 (1924), the Supreme Court of Appeals of West Virginia, which had the occasion to construe the term "surplus" in its statutes of descent and distribution, which, as herein pertinent, are similar to those in the District of Columbia, held (97 W.Va., p. 493, 125 S.E., p. 340):

The word "surplus" means what remains of the estate after payment of funeral expenses, charges of adminis-

tration and debts. This statute gives to the widow one-third of the *surplus* as her distributive share.

And in a later case the same court in *Guaranty National Bank v. Mitchell*, 144 W.Va. 828, 111 S.E. 2d 494 (1959), held again that under the descent and distribution statutes of West Virginia federal estate taxes must be deducted from the decedent's probate assets before arriving at the *surplus* which is distributable pursuant to the provisions of those statutes.

In *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E. 2d 879 (1953), the Supreme Court of North Carolina also had the occasion to construe the term "surplus" in its statutes of descent and distribution, which, as herein pertinent, are also similar to the descent and distribution statutes of the District of Columbia. Therein the highest court of North Carolina held (236 N.C., p. 659, 73 S.E. 2d, p. 883):

The word *surplus* means the personal property left *after* payment of the debts of the deceased *and* the costs of *administration*. Douglas Administration of Estate, Sec. 222. *It means the balance for distribution after all expenses of administration and debts including [federal estate] taxes have been paid.* *Weinberg v. Safe Deposit & Trust Co., Md.*, 85 A. 2d 50, *Hunter v. Husted*, 45 N.C. 97. (Emphasis supplied.)

Taxpayer in its brief does not cite *any* decisions of this Court or *any* other court which has had the occasion to construe the term "surplus" in the context of statutes of descent and distribution of the respective states. Nonetheless, taxpayer, by employing conjectures and speculations, urges this Court to impute strained, illogical variations of meaning to the term "surplus" during the periods (1) from 1789 until 1916—the date of the enactment of the modern Federal Estate Tax Act; (2) from 1916 until 1948—the date of the enactment of the marital deduction provisions and (3) from 1948 to the present date; (Br. 25–32.) It is plain, in the light of the legislative history and the consistent holdings of various courts hereinabove set forth, taxpayer ingeniously contends, unmeritoriously, based upon its tenuous reasoning, that the Congress in all events intended that the term "surplus" should have the chronological "elasticity" which it has formulated. (Br. 31.) Taxpayer, we respectfully submit, in its desire to have this Court reverse the judgment of the court below, has plainly ignored the teaching of the Su-

preme Court in *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1924), to the effect that "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

Therefore, it is respectfully submitted that the "surplus" of an intestate's probate assets which is distributable under the descent and distribution statutes of the District of Columbia as amended on September 14, 1961, and re-enacted on September 14, 1965, means the balance of the intestate's probate assets remaining *after* deducting therefrom the intestate's funeral expenses, debts, claims against him, and all expenses incurred in the administration of his estate, *including* federal and District of Columbia estate taxes.

2. Congress, in its characterization in Section 18-211(e), District of Columbia Code (1961 ed.), as amended September 14, 1961, of the distributable portion of an intestate's probate estate as his "net estate," intended that such distributable portion includes only the balance or surplus of the intestate's probate estate remaining *after* deducting therefrom funeral expenses, debts, claims, and all expenses of administration, including federal and District of Columbia estate taxes

We have shown in Subdivision E(1) of our brief, *supra*, that the term "surplus" probate assets and the term "net" probate assets, as written into the descent and distribution statutes of the District of Columbia herein involved, have the identical meaning. In *Kilcoyne v. Reilly*, 101 U.S. App. D.C. 380, 249 F. 2d 472 (1957), the decedent's estate consisted solely of personal property. In that case a surviving spouse had "renounced the provisions of the will and elected to take under the statute [Section 18-704 of the 1961 District of Columbia Code]." Under Section 18-704 she was entitled to receive one-half of the "surplus" of the estate. In the opinion in *Kilcoyne*, *supra*, the surviving spouse's interest in decedent's probate assets was unequivocally and unambiguously characterized as "one-half of the *net* assets of the estate" (101 U.S. App. D.C., p. 382, 249 F. 2d, p. 474) (emphasis supplied) and as "the *net* distributable assets of a decedent" (p. 383, 294 F. 2d, p. 475). (Emphasis supplied).

In *Campbell v. Lloyd*, 162 Ohio St. 203, 125 N.E. 2d 695 (1945), certiorari denied, 349 U.S. 911, rehearing denied, 349 U.S. 948, *supra*, the widow, as in the case at bar, renounced her

husband's will and elected to take her share under the descent and distribution statutes of Ohio. Such statute, to wit, Section 10504-55 of the General Code of Ohio, quoted in *Campbell, supra*, provided that the widow's share "shall * * * not * * * exceed one-half of the *net* estate." (Emphasis supplied.) In *Campbell, supra*, as in effect in the case at bar, the question presented to the court for decision was whether the meaning of "the words 'net estate' is what remains of the estate after all debts and obligations of decedent and of the estate, including the federal estate tax, have been paid." (162 Ohio St., p. 205, 125 N.E. 2d, p. 697.) The Supreme Court of Ohio held that in determining the amount of the "net estate" it was mandatory that "the federal estate tax should first be deducted, like other debts and expenses of administration." (162 Ohio St., p. 208, 125 N.E. 2d, p. 698.)

In *In re Uihlein's Will*, 264 Wisc. 362, 59 N.W. 2d 641 (1953), the widow, as also in the case at bar, renounced her husband's will and elected to take her share under the descent and distribution statute of Wisconsin. Such statute, to wit, Section 233.14, 27 West's Wisconsin Statutes, Annotated, pertinently quoted in *In re Uihlein's Will, supra*, provided that the widow's share "shall not exceed the one-third part of his *net* personal estate." (Emphasis supplied.) In *Uihlein's Will, supra*, as in the case at bar, the question presented to that court for decision was (264 Wisc., p. 368, 59 N.W. 2d, p. 644): "Is the widow who has elected to take one-third share of the estate, pursuant to Sec. 233.14, Stats., entitled to such share without deduction therefrom of any portion of the federal estate tax?" The Supreme Court of Wisconsin therein held (p. 376, p. 658):

It seems to us that the words "*net estate*" of our statute are clear and unambiguous and are subject to no other interpretation than that they mean that part of the estate which remains after payment of all charges against the entire estate. Federal estate taxes stand in no different category than do debts or administrative expenses. We deem that it would be unwarranted judicial legislation for this court to attempt to apportion the impact of the federal estate tax * * *.

This holding and declaration of law in *Uihlein* was approvingly cited in *In re Glovers' Estate*, 45 Haw. 569, 580, 371 P. 2d 361, 367 (1962); *Old Colony Trust Co. v. McGowan*, 156 Me. 138,

145, 163 A. 2d 538, 542 (1960); *Moorman v. Moorman*, 340 Mich. 636, 643, 66 N.W. 2d 248, 251 (1954).

Hence it is respectfully submitted that the Congress, in its characterization in Section 18-211(e) of the District of Columbia Code (1961 ed.) as amended September 14, 1961, of the distributable portion of an intestate's probate estate as his "net estate", intended that such distributable portion includes only the balance or surplus of the intestate's estate remaining after deducting therefrom funeral expenses, debts, claims, and all expenses of administration, including federal and District of Columbia estate taxes.

In view of the foregoing, it is respectfully submitted that it is the intention of the Congress acting in its role as the legislative body for the District of Columbia, that, whenever a decedent domiciled in the District of Columbia is survived by a spouse and a child, his surviving spouse who disavows his will and elects to take her legal share of his probate assets is entitled to only one-third of the balance or surplus of the decedent's probate assets remaining after the deduction therefrom of funeral expenses, debts, claims and all administration expenses, including federal and District of Columbia estate taxes.

F. There is no merit to taxpayer's contention that the Congress, in enacting the marital deduction provisions in 1948 "implicitly expected" (Br. 30) that this Court, by judicial fiat, "must adopt a [so-called] rule of equitable apportionment of the [federal estate] tax" (Br. 5) in order to free from any impact of the federal estate tax the share of the distributable surplus of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703 of the District of Columbia Code (1961 ed.)

1. Taxpayer's contention that it was the intention of the Congress that the settled application of the statutes of descent and distribution should by judicial fiat be modified by this Court as a result of the enactment of the marital deduction provisions, to the end that a surviving spouse's share of the probate assets of her deceased husband to which she is entitled under Section 18-703 of the District of Columbia Code (1961 ed.) should be free from any impact of federal estate taxes (and thereby increasing the amount of the allowable marital deduction) in order that "the purpose of the Congress [in enacting such deduction] will [not] be thwarted" (Br. 34), is devoid of any merit

At the outset it should be pointed out that taxpayer in its brief does not refer to any specific provision of Section 2056 of the Internal Revenue Code (which provides for the marital deduction) to support its contention that it was the intention of the Congress by that enactment that this Court or any court should in anywise modify the application of the descent and

distribution statutes of a state in order that "the purpose of the Congress will [not] be thwarted." (Br. 34.) The reason for the absence of any such reference is clear. There is no such provision in Section 2056 of the Internal Revenue Code of 1954.

As disclosed in S. Rep. No. 1013 Part 2, 80th Cong., 2d Sess., p. 5 (1948-1 Cum. Bull. 331, 333), which accompanied the bill which enacted the marital deduction, it is the intent of the Congress (contrary to the contention of taxpayer) that the state statutes of descent and distribution should in nowise be modified by the marital deduction enactment, stating as follows (p. 5 (1948-1 Cum. Bull. p. 334)):

* * * if the surviving spouse elects to take her share of the decedent's estate under the local law instead of taking an interest under the will, *the interest she takes under the local law is by the definition in section 812(e) (3) [of the 1939 Code, now Section 2056(e) of the 1954 Code] considered as passing from the decedent to the surviving spouse [which qualifies for the marital deduction].* (Emphasis supplied.)

That the Congress in enacting the marital deduction did *not* in anywise intend state courts to modify the application of descent and distribution statutes of their respective states because of such enactment and the reasons therefor are succinctly summarized (1) by the Supreme Court of North Carolina in *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 695, 73 S.E. 2d 877, 883 (1953), as follows—

The federal tax statute as amended which makes provision for marital deduction does not have the effect of controlling the state statutes as to the administration of decedent's estate. Power in this respect has not been granted to the Federal Government, and the right of state control is reserved (10th Amendment). The Supreme Court of the United States has repeatedly declared the Federal Government is concerned only with the collection of the tax, leaving it to the states to determine how the burden shall be distributed and upon whom the impact shall fall. *Y.M.C.A. v. Davis*, 264 U.S. 47, 44 S. Ct. 291, 68 L. Ed. 558; *Riggs v. Del Drago*, 317 U.S. 95, 63 S. Ct. 109, 87 L. Ed. 106; *Fernandez v. Wiener*, 326 U.S. 340, 66 S. Ct. 178, 181, 90 L. Ed. 116. "Although the share of the surviving spouse is subject

to the lien and the tax must be paid out of the estate as a whole, the federal statute leaves it to the states to determine how the tax burden shall be distributed among those who share in the taxed estate." *Fernandez v. Wiener, supra*.

—and (2) by the Supreme Court of Wisconsin in *In re Uihlein's Will*, 264 Wisc. 362, 373, 59 N.W. 2d 641, 646-647 (1953), as follows:

While the marital deduction provisions of the federal estate tax law did not come into being until 1948, there is nothing contained in the 1948 amendments to the federal estate tax law which would render inapplicable the rule laid down in *Riggs v. Del Drago, supra*. Furthermore, U. S. Treasury Regulations 105, sec. 81.47(c) clearly recognize that local state law is determinative of the question of whether the widow's one-third share of the personal estate in the instant case, is, or is not, subject to the impact of the federal estate tax.

* * * * *

While the motivating purpose of Congress in creating the marital deduction was undoubtedly to give non-community property states the same estate tax advantages that community property states have, Congress made it very clear by the provisions of 812(e)(1)(E) of the Internal Revenue Code that a spouse's share qualifying for marital deduction might still be subject to federal estate tax. The Treasury Regulations issued to implement such section are proof of the fact that the rule of *Riggs v. Del Drago, supra*, still stands. In other words, Congress expressly left the question, of whether a spouse's share of an estate qualifying for marital deduction should be subject to federal estate tax, to the individual states to determine for themselves.

To the same effect are the observations of (1) the Supreme Court of Virginia in *Baylor v. National Bank of Commerce of Norfolk*, 194 Va. 1, 7, 72 S.E. 2d 282, 285 (1952), which therein held as follows—

The Act of Congress imposing a tax upon the transfer of property from a decedent and authorizing the marital deduction, did not change the applicable state law as to the devolution of property at death. "The intent of Congress was that the federal estate tax should be paid

out of the estate as a whole, and that the distribution of the remaining estate and the ultimate impact of the federal tax should be determined under the state law."

Riggs v. Del Drago, 317 U.S. 95, 63 S. Ct. 109, 87 L. Ed. 106. 142 A.L.R. 1131.

—and (2) the Supreme Judicial Court of Maine in *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 146–147, 163 A. 2d 538, 543 (1960), which therein held:

Thus far Congress has not seen fit to allocate the burden of the federal estate tax, but has left it to "state law (to) determine the ultimate thrust of the tax." *Riggs v. Del Drago*, 1942, 317 U.S. 95, 63 S. Ct. 109, 112, 87 L. Ed. 106. The testator is free to allocate the burden by provisions of the will, but such provisions do not aid a widow who elects to renounce the will and who cannot thereafter claim its benefits. The door is always open to states to enact apportionment statutes and many have done so. Maine, however, has no such statute. As a matter of judicial policy we do not recognize such a compelling equity in the widow arising from the marital deduction as would lead us to a different construction of the statute which defines her interest.

The United States District Court for the District of Columbia in *Herson v. Mills*, 221 F. Supp. 714, 715–716 (1963), *supra* (which is on all fours with the case at bar, as heretofore pointed out), made a similar observation. The Honorable Burnita Matthews, who sat as the court below, was also the author of the opinion in *Herson*, *supra*. In *Herson* and in the court below, Judge Matthews' holdings were in harmony with these holdings of the highest courts of North Carolina, Wisconsin, Virginia, and Maine, as hereinabove set forth.

2. Contrary to taxpayer's contention, Section 2056(b)(4) of the Internal Revenue Code of 1954 negates and disclaims any intention on the part of Congress that the one-third of the surplus of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703 of the District of Columbia Code should escape any impact of any federal estate tax

Section 2056(b)(4)(A) of the Internal Revenue Code of 1954 provides:

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.*—

* * * * *

(4) *Valuation of interest passing to surviving spouse.*—In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; * * *

In construing Section 812(e)(1) of the Internal Revenue Code of 1939, the precursor of Section 2056(b)(4) of the Internal Revenue Code of 1954, the Supreme Court of Ohio in *Campbell v. Lloyd*, 162 Ohio St. 203, 206, 122 N.E. 2d 695, 697 (1954), certiorari denied, 349 U.S. 911, rehearing denied, 349 U.S. 949, held that "Congress *disclaimed* any intention that the marital deduction should *not* be burdened by the estate tax." (Emphasis supplied.)

The Supreme Court of Wisconsin is in accord. In *In re Uihlein's Will*, 264 Wisc. 362, 371, 59 N.W. 2d 641, 645 (1953), that court held:

Thus the Internal Revenue Code expressly provides that in computing the value of the interest of a surviving spouse for purposes of the marital deduction in determining the federal estate tax *there is to be taken into account the impact of any part of the federal estate tax which falls upon such interest of the surviving spouse.* This provision of the federal estate tax statutes thus would seem to expressly *negate* any intent on the part of Congress that the widow's share of the personal estate in the instant case [widow disavowed will] should entirely escape the impact of all of the federal estate tax. (Emphasis supplied.)

This holding in *Uihlein's Will*, *supra*, was expressly followed by the Supreme Court of Michigan in *Moorman v. Moorman*, 340 Mich. 636, 66 N.W. 2d 248 (1954), and by the Supreme Court of Haw. in *In re Glovers' Estate*, 45 Haw. 569, 371 P. 2d 361 (1962). In *Glovers' Estate*, *supra*, that court held (pp. 577-588, 37 pp. 365-366):

In computing the value of the interest of the surviving spouse for purposes of the marital deduction it is necessary by reason of the provisions of § 2056(b)(4)

of the Internal Revenue Code, above quoted, to take into account any part of the federal estate tax which falls upon the interest of the surviving spouse. Consequently, as is stated in *In re Uihlein's Will*, 264 Wis. 362, 59 N.W. 2d 641, at p. 645, 38 A.L.R. 961: "This provision of the federal estate tax statutes thus would seem to expressly negate any intent on the part of Congress that the widow's share of the personal estate in the instant case should entirely escape the impact of all of the federal estate tax."

The United States District Court for the District of Columbia in *Herson v. Mills*, 221 F. Supp. 714, also so construed Section 2056(b)(4)(A), holding (p. 715):

* * * in determining the amount of the "marital deduction" on the federal estate tax return the law requires that there shall be taken into account the effect the federal estate tax has on the net value of the surviving spouse's interest. 26 U.S.C.A. § 2056(b)(4)(A).

Therefore, it is respectfully submitted that, contrary to taxpayer's contention, Section 2056(b)(4) of the Internal Revenue Code of 1954 *negates and disclaims* any intention on the part of Congress that the one-third of the *surplus* of decedent's probate assets which his surviving widow is entitled to receive under Section 18-703 of the District of Columbia Code should escape any impact of any federal estate tax.

3. *Taxpayer's contention (Br. 20, 24) that with the enactment of the marital deduction provisions in 1948 the Congress expressly provided that the surviving spouse, in the case of intestacy or election against the will of a testate decedent should take her statutory share free of any estate tax merely because her distributable share under the descent and distribution statutes of the states qualifies for the marital deduction, is devoid of any merit and flies in the face of the ratio decidendi in the opinions of the Supreme Court in Y.M.C.A. v. Davis and Harrison v. Northern Trust Co.*

It is the position of the Government that taxpayer's contention, oft repeated and reiterated in its brief (pp. 5, 12, 13, 16, 20, 24, 33, 34), to the effect that it was the intention of the Congress in enacting the marital deduction provisions in 1948 that the one-third of the distributable *surplus* of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703, District of Columbia Code (1961 ed.), is free from any impact of any federal estate tax solely because such distributable share qualifies for the marital deduction, is

devoid of any merit and flies in the face of the *ratio decidendi* of the Supreme Court unambiguously enunciated in its opinions in *Y.M.C.A. v. Davis*, 264 U.S. 47 (1924), and *Harrison v. Northern Trust Co.*, 317 U.S. 476 (1943).

Y.M.C.A. v. Davis, 264 U.S. 47, *supra*, and *Harrison v. Northern Trust Co.*, 317 U.S. 476, *supra*, as in the case at bar, involved federal estate taxes. In these two Supreme Court cases, gifts to charities were allowable deductions (pursuant to statutes, precursors to Section 2055 of the Internal Revenue Code of 1954, Appendix, *infra*), as are the value of interests in property of a decedent which pass from him to his surviving spouse under state law (not "terminable") which qualify for the marital deduction under Section 2056 of the 1954 Code. In the Supreme Court cases, as in the case at bar, these deductions are taken from the decedent's statutory gross estate in arriving at his statutory taxable estate upon which the federal estate tax is imposed.

In these two Supreme Court cases, it was therein contended that since the federal estate tax is imposed upon the decedent's statutory taxable estate, and since the charitable gifts as deductions from gross estate had been excluded by the statute from such taxable estate, it was the intent and purpose of the Congress to free these charitable gifts from any impact of any federal estate tax. By substituting the marital deduction allowable under Section 2056 of the Internal Revenue Code of 1954 for the charitable deduction allowable under the predecessors of Section 2055 of the 1954 Code, taxpayer makes the identical contention here. This contention is devoid of any merit because the Supreme Court in *Y.M.C.A. v. Davis*, *supra*, unequivocally rejected it. Mr. Chief Justice Taft, speaking for a unanimous Court, stated (pp. 50-51):

* * * What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death. *Knowlton v. Moore*, 178 U.S. 41, 48, 49.

Congress was thus looking at the subject from the standpoint of the testator and not from the immediate

point of view of the beneficiaries. It was intending to favor gifts for altruistic objects, not by specific exemption of those gifts but by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death. It said to him "if you will make such gifts, we'll reduce your death duties and measure them not by your whole estate but by that amount, less what you give." In § 408 it is declared to be the intent and purpose of Congress that as far as it is practicable and unless otherwise directed by the testator, the tax is to be paid out of the estate before distribution.

There is nothing in subdivision (3) of § 403 which exempts the recipients of altruistic gifts from taxation; it only requires a deduction of them in calculating the amount of the estate which is to measure the tax. It exempts the estate from a tax on what is thus deducted.

* * *

It was wholly within the power of the testatrix to exempt her altruistic gifts from payment of the tax by specific direction to her executor, if she chose. * * * The gifts are and were intended by the testator to be indefinite in amount and to be what was left after paying funeral expenses, attorneys fees, executor's compensation, debts of the decedent and taxes. These donees do not pay the taxes any more than they pay the funeral expenses, the lawyers, the executors and the testator's debts.

To the same effect is *Harrison v. Northern Trust Co.*, *supra*.

In *Herson v. Mills*, 221 F. Supp. 714 (D.C.D.C. 1963), the court stated (p. 715): "* * * it should be noted there is no express provisions in the federal estate tax law * * * which * * * exempts the widow's share from liability [for federal estate taxes]" and moreover, that "there is no law of this jurisdiction [District of Columbia] which * * * exempts the widow's share from liability [for federal estate taxes]." ²²

²² In fact, some states which have enacted apportionment statutes have even expressly provided for no exoneration from federal estate taxes of the share of a decedent's probate assets received by a surviving spouse who, as in the case at bar, had renounced the will of her deceased spouse. *Weinberg v. Safe Dep. & Trust Co.*, 198 Md. 539, 545-546, 553, 85 A. 2d 50, 53, 56 (1951); and *Williamson v. Williamson*, 272 S.W. 2d 72, 74 (Okla. 1954). See *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 147, 163 A. 2d 538, 543 (1960).

We submit that, as summarized by this Court in *Hepburn*, *supra*, 65 U.S. App. D.C., p. 315, 83 F. 2d, p. 572, it was and is the intent of Congress in its enactment of the federal estate tax that—

As to intestate successors the tax is not imposed upon them but precedes them and the fact that they may receive less or different sums because of the statute does not concern the United States.

It is indisputable that neither the federal statutes nor the descent and distribution statutes of the District of Columbia treat gifts to charities, which qualify for the charitable deduction under Section 2055 of the Internal Revenue Code of 1954, any differently from "gifts" from a decedent to a surviving spouse, which qualify for the marital deduction under Section 2056 of the 1954 Code. Accordingly, under the *ratio decidendi* of *Y.M.C.A. v. Davis*, *supra*, and *Harrison v. Northern Trust Co.*, *supra*, we respectfully submit that the one-third of the surplus of decedent's probate assets distributable to his surviving spouse under Section 18-703, District of Columbia Code (1961 ed.), should *not* escape the impact of any federal estate tax.²³

²³ The commentator, Lauritzen, *Apportionment of Federal Estate Taxes*, 1 Tax Counselor's Quarterly (1957), cited in the footnote on page 15 of taxpayer's brief, also expressly rejects the contention of taxpayer upon the authority of *Y.M.C.A. v. Davis*, *supra*, as well as upon other authorities, stating (p. 86):

"The argument is always made that the wife [who 'has renounced the will'] should receive her share without paying any portion of the federal estate tax because of the fact that such a share will qualify for the marital deduction. The fallacy of this argument has, of course, been clearly demonstrated by the Supreme Court of the United States in *Young Men's Christian Ass'n* case."

Lauritzen further stated (p. 85):

"* * * it has been forcibly argued that such property [which qualifies for the marital deduction] should bear no part of the tax, because such property does not contribute to determining the amount of the tax. This argument has a superficial logic which is most beguiling. As a matter of law, however, the argument is incorrect and was long ago disposed of by the Supreme Court of the United States. In the case of *Young Men's Christian Association of Columbus, Ohio v. Davis*, the charitable legatees argued that none of the

In view of the foregoing, we further respectfully submit that there is no merit to taxpayer's contention that the Congress, in enacting the marital deduction provisions in 1948 "implicitly expected" (Br. 30) that this Court, by judicial fiat, "must adopt a [so-called] rule of equitable apportionment of the [federal estate] tax" (Br. 5) and thereby free from any impact of such tax the share of the distributable surplus of decedent's probate assets which his surviving spouse is entitled to receive under Section 18-703 of the District of Columbia Code (1961 ed.), solely because her distributable share of such surplus "qualifies for the marital deduction" (Br. 20), and in order that "the purpose of the Congress [in enacting the marital deduction] will [not] be thwarted" (Br. 34).

G. The unappealed decision of the United States District Court for the District of Columbia in *In re Estate of Collins*, decided on June 13, 1967, and relied upon by the taxpayer does not refer to or discuss any decision of any District of Columbia court, is in direct conflict with *Herson v. Mills*, *supra*, is contrary to the law as embodied in the jurisprudence of the District of Columbia, and should not be followed

On June 13, 1967, the District Court of the District of Columbia handed down a decision in *In re Estate of Collins*, 269 F. Supp. 633, in which it held that the federal estate tax is not to have any impact upon the distributable surplus of an intestate's probate assets which the intestate's surviving spouse is entitled to receive under the statutes of descent and distribution of the District of Columbia. We will show in this section of our brief that such holding is entirely without merit.²⁴

The intestate in *Collin's*, *supra*, died subsequent to the effective date of the Act of September 14, 1965, P.L. 89-183, 79 Stat. 685, which undertook to codify "Part III, of the District of Columbia Code, 'Decedent's Estates and Fiduciary Relations'" (Sec. 1). As already pointed out, S. Rep. No. 612, 89th

Federal estate tax should be paid from the residue to which they were entitled, because all of such property passing to them was exempt from tax by Federal statute. The Supreme Court denied this contention and pointed out that the property passing to the charities was not exempt from tax; rather, the estate was merely given a deduction equal to the amount of such property in computing such tax. The situation with regard to marital deduction property is precisely the same, and the same rule necessarily applies."

²⁴ It should parenthetically be pointed out that the Government was not a party in *Collins* and had not been apprised of the pendency of that case.

Cong., 1st Sess., p. 3, which accompanied the bill which enacted that law, stated that "It is not the purpose [of this codification] to make substantive changes in the law * * * [but] to reflect * * * only what apparently was the legislative intent, or is implied in the provisions themselves, or has been stated by the [District of Columbia] courts in construing the sections." (Emphasis supplied.)

Section 19-301 of this 1965 codification (District of Columbia Code (1961 ed., Supp. V)), as demonstrated in Subdivision E(1) of our brief, *supra*, provided that before arriving at the surplus personal estate of the intestate which is distributable under Sections 19-302 to 19-314, there shall be deducted from such personal estate of the intestate "the intestate's funeral expenses, debts, costs of administration, and estate * * * taxes * * *." Nevertheless, in the opinion in *Collins*, no reference is made to Section 19-301. Nor is there any reference in the opinion in *Collins* to any cases decided by any courts of the District of Columbia, including this Court. Of course the opinion in *Collins* does not cite or discuss District of Columbia cases which have unequivocally held that the federal estate tax should be treated as an administration expense and that such tax accordingly should be deducted from the probate assets of the intestate before arriving at the distributable "surplus" thereof, within the meaning of "surplus" as written into the statutes of descent and distribution, as set forth in Subdivision E of our brief, *supra*. Moreover, we find upon examination of the petitioner's brief filed in the U.S. District Court for the District of Columbia in the *Collins* case that such brief makes but a single reference to any case decided by any court in the District of Columbia. Such reference in its entirety reads as follows: "Counsel is aware of the decision of *Herson v. Mills*, 221 F. Supp. 714, but submits that it is distinguishable and, if thought to be applicable should not be followed." However, in the opinion in *Collins*, as already pointed out, no mention is made therein, directly or indirectly to *Herson*, *supra*, or to any other District of Columbia case. District of Columbia cases have been completely ignored in the opinion in *Collins*.

Furthermore, there is no specific reference or discussion in the opinion in *Collins* to any of the pertinent provisions of the Internal Revenue Code of 1954 to support the holding in *Collins* that it was the intention of the Congress that an intestate's probate assets which pass from him to his surviving spouse

should be free from any impact of any federal estate tax, merely because the value thereof qualifies for the marital deduction under Section 2056 of the 1954 Internal Revenue Code. We have shown in Subdivisions A, B, C and D of our brief, *supra*, that there are no such provisions in the Internal Revenue Code of 1954.

Cited in the opinion in *Collins* (p. 634) is *Northeastern Nat. Bank v. United States*, 387 U.S. 213 (1967). The issue in that case which was presented to the Supreme Court for its decision was the narrow and restricted question of the meaning of the words "specific portion" in Section 2056(b)(5) of the Internal Revenue Code of 1954. This issue is not involved in the case at bar and this case manifestly is not in point. Moreover, even the isolated quotation in *Collins* (p. 634) from *Northeastern Nat. Bank, supra*, on page 219 of the Supreme Court's opinion, to wit, that "The [marital] deduction was enacted in 1948, and the underlying purpose was to equalize the incidence of the estate in community property and common law jurisdictions" does not support the holding in *Collins*. In this excerpt the Supreme Court merely reiterated that in enacting the marital deduction provisions the Congress intended "to equalize the incidence of the estate tax" (emphasis supplied). Such excerpt moreover does not support the contention of taxpayer that the Congress had enacted the marital deduction provisions for the benefit of the surviving spouse, in order to maximize the quantum of distributable *surplus* of an intestate's probate assets receivable by a surviving spouse (widow or widower), under the laws of descent and distribution of the state in which the intestate was domiciled.

The Supreme Judicial Court of Maine in a very thorough and well-considered opinion in *Old Colony Trust Co. v. McGowan*, 156 Maine 138, 145-146, 163 A. 2d 538, 542-543 (1960), demonstrated the fallacy of this contention of taxpayer as well as the speculations indulged in by the court in *Collins*. That court observed (pp. 145-146, 163 A. 2d, pp. 542-543):

The widow vigorously contends that any result which compels her to bear any share of the burden of federal estate tax is grossly inequitable since that portion of the estate which descended to her qualifies for marital deduction and adds nothing to the tax. This argument has frequently been advanced but has ultimately been rejected by most of those courts which have dealt with the problem. In this connection it is necessary to keep

in mind the nature of the marital deduction. Sec. 2056(a) of the Internal Revenue Code, 26 U.S.C.A. § 2056(a), provides in part that in ascertaining the value of the taxable estate there is deducted from the gross estate "an amount equal to" the interest passing to the surviving spouse (as limited). The words used are words of measure, not of an *exemption* given to the surviving spouse, but of a *deduction* given to the estate. If we could translate the language of the section into terms of ownership we might say that the marital deduction must be thought of as belonging to the estate rather than to the surviving spouse. This concept seems to have guided the court in *Young Men's Christian Ass'n of Columbus, Ohio, v. Davis*, 1924, 264 U.S. 47, 44 S.Ct. 291, 68 L.Ed. 558, a case in which the estate had the benefit of charitable deductions, but the charitable institutions which were residuary legatees were compelled to share the burden of the tax as thus reduced. The court pointed out that the charitable beneficiaries profited much by the charitable deductions but not to the extent of acquiring exemptions. The same underlying concept has relevance in the case of the surviving spouse and the marital deduction. See *Thompson v. Wiseman*, 10 Cir., 1956, 233 F. 2d 734.

The above quotation from *Old Colony Trust Co., supra*, also similarly demonstrates, we submit, that the intent imputed to the Congress in *Collins* (p. 634) by its quotation from *Pitts v. Hamrick*, 228 F. 2d 486 (C.A. 4th 1955), is unsupportable. In any event, such quotation *even* in *Pitts*, is, at best, *obiter*. It certainly was not the ground upon which the decision in *Pitts* was founded. In *Pitts*, the court based its decision upon the state law of South Carolina, as it deemed it would have been declared by the highest court of South Carolina, since that exact legal issue had not been decided by the latter court. It clearly appears from the opinion in *Pitts*, that the Fourth Circuit based its determination of what the Supreme Court of South Carolina would have declared the law to be (if the issue were presented to it for decision) upon the authority of two cases, *Lincoln Bank & Trust Co. v. Huber*, 240 S.W. 2d 89 (Ky. 1951), and *Miller v. Hammond*, 156 Ohio St. 475, 104 N.E. 2d 9 (1952). In *Pitts* after considering the latter two cases, the court held (p. 490): "while the Supreme Court of the state [South Carolina] has not passed upon the matter, the decision of the probate

court is based upon reason and *may fairly be accepted as evidencing the law of the state.*" (Emphasis supplied.) In *Pitts* the court at great length quoted from the opinion in the Ohio case (pp. 489-490), after stating that the Ohio case "is practically on all fours with the case at bar" (p. 489).

We regret the need of pointing out that this decision of the Ohio court, upon which *Pitts* predicated its determination, had been *reversed* (by a decision in harmony with the decision of the court below in the instant case) thirteen months *earlier* by the same Supreme Court of Ohio in *Campbell v. Lloyd*, 162 Ohio St. 203, 209, 122 N.E. 2d 695, 698-699, to wit, on November 17, 1954. *Pitts* was decided subsequent thereto, on December 30, 1955. Accordingly, it is submitted that the decision in *Pitts*, which had inadvertently relied upon an earlier reversed ruling of the Ohio Supreme Court manifestly should not be followed by this Court. It is interesting to note that *Pitts* was specifically not followed by the Supreme Judicial Court of Maine in *Old Colony Trust Co. v. McGowan*, *supra* (pp. 145, 147, 163 A. 2d, pp. 542, 543).

The only other case relied upon by *Pitts*, as already pointed out, was the Kentucky case of *Lincoln Bank & Trust Co. v. Huber*, *supra*. It is plain that this Kentucky case predicated its decision, as we shall presently show, upon an incontrovertible erroneous *obiter dictum* found in the opinion of a Surrogate of Suffolk County, New York, in *In re Peter's Will*, 204 Misc. 333, 338, 88 N.Y.S. 2d 142, 147 (1949). This Kentucky case held (240 S.W. 2d, p. 91):

Upon the *authority of In re Peters*, above, we conclude that * * * the marital allotment * * * since that item does not add to the tax, * * * cannot be burdened with any portion of the federal estate tax. The surviving spouse [who had disavowed the decedent's will], therefor, should receive her share undiminished by any federal estate tax. (Emphasis supplied.)

The incontrovertible erroneous *obiter dictum* in *In re Peters' Will*, *supra*, referred to above, reads as follows (p. 338, 88 N.Y.S. 2d, p. 147):

Its [Congress'] purpose [in enacting the marital deduction] is to allow a surviving spouse to take a certain portion of the estate free of Federal estate taxes. * * *

* * * * *

I believe that the marital deduction now allowed by Section 812(e) Internal Revenue Code [1939, now Section 2056 of the 1954 Code] is substantially in the same category as the charitable deduction allowed by Section 812(d) of the Code [Section 2055 of the 1954 Code], which immediately precedes it, and that just as a charitable bequest is free of Federal estate taxes, so is a widow's intestate share.

It is indisputable that this erroneous *obiter dictum* was not in anywise essential to support the decision of the Surrogate, who was called upon merely to construe New York statutes which were not even remotely similar to any statute in the Code of the District of Columbia. See the criticism of this erroneous *obiter dictum* in *Weinberg v. Safe Deposit & Trust Co.*, *supra* (pp. 549-550, 85 A. 2d, pp. 54-55). In all events, it is incontrovertible that this *obiter dictum* incorrectly stated the law as declared by the Supreme Court in *Y.M.C.A. v. Davis*, *supra*, and flies in the face of its decision, as we have shown in Subdivision F(3) of our brief, *supra*. The Supreme Court of Hawaii in *In re Glovers' Estate*, *supra* (pp. 578-579, 371 P. 2d, p. 366), and the Supreme Court of Wisconsin in *In re Uihlein's Will*, *supra* (p. 373, 59 N.W. 2d, p. 647), fully support this position of the Government and both of these cases are in complete accord with the detailed analysis of the Court of Appeals of Maryland in *Weinberg*, *supra*, with respect to this erroneous *obiter dictum* in *In re Peter's Will*, *supra*.

The opinion in *Collins* (p. 634) also relied upon the decision of the Kentucky Court in *Lincoln Bank & Trust Co. v. Huber*, *supra*, which in turn, as already pointed out, was based upon this erroneous *obiter dictum* in *In re Peter's Will*, *supra*. This Kentucky decision, we respectfully submit, manifestly should not be followed by this Court. It was expressly *rejected* as an *invalid* authority by the Supreme Court of Wisconsin in *In re Uihlein's Will*, *supra*. Therein that court held (p. 373, 59 N.W. 2d, p. 646):

The reasons advanced by the Kentucky Court for its decision in *Lincoln Bank & Trust Co. v. Huber*, *supra*, are demonstrably untenable. (Emphasis supplied.)

This Kentucky case was similarly rejected by the Supreme Court of Hawaii in *In re Glovers' Estate*, *supra*. Therein the court stated (pp. 576-577, 371 P. 2d, p. 365):

The proposition that the purpose and intent of the Congress in establishing the marital deduction is the decisive factor in determining the issue is not acceptable to us * * *.

* * * the conclusion reached in *Huber* * * * that, by reason of the marital deduction, the widow's dower in personalty does not create any federal estate tax, is *unsupportable*. (Emphasis supplied.)

This Kentucky case was also expressly not followed by the Supreme Judicial Court of Maine in *Old Colony Trust Co. v. McGowan*, *supra*. (pp. 145, 147, 163 A. 2d pp. 542, 543).

In view of the foregoing, it is respectfully submitted that since the decision in *Pitts* was (1) inadvertently predicated upon a decision of the Supreme Court of Ohio which had been overruled by the latter court about one year prior to the decision of *Pitts* and (2) was predicated upon a decision of the Court of Appeals of Kentucky, which in turn had based its decision upon an erroneous *obiter dictum* of a Surrogate of Suffolk County, New York, which incontrovertibly is contrary to the decision of the Supreme Court of the United States in *Y.M.C.A. v. Davis*, *supra*, the reliance upon *Pitts* by the court in *Collins* was misplaced.

Also cited in the opinion of *Collins* (p. 634) is *Dodd v. United States*, 345 F. 2d 715 (C.A. 3d 1965). In that case the Court of Appeals for the Third Circuit undertook to construe a decedent's will under the laws of New Jersey. Applying that law in its interpretation of the decedent's will the court found that it was the intention of the testator that his gift to his surviving spouse should be free from any impact of any federal estate tax. Clearly a testator may so provide in his will. However, *Dodd* is not in point, since in the case at bar, the surviving spouse had renounced her deceased spouse's will and had elected to take under the statutes of descent and distribution of the District of Columbia, and it is those statutes alone which determine the value of the decedent's probate assets which had thereunder passed from him to his surviving spouse.

Moreover, the quotation from *Dodd* in *Collins* (p. 634) to the effect that the "marital deduction" was enacted "presumably" with the end in view of maximizing the property which passes from a decedent to his surviving spouse under the descent and distribution statutes of a state is not only *obiter dictum* but, moreover, such *presumption*, as we have already pointed out, does not find any support in any of the provisions

of Section 2056 of the 1954 Internal Revenue Code. In any event, *Dodd* manifestly does not support the holding in *Collins*, which we submit is incorrect. Also cited in the opinion in *Collins*, p. 634, is a quotation from the Supreme Court of Missouri in *Hammond v. Wheeler*, 347 S.W. 2d 884 (Mo. 1961), it is not too dissimilar from that court's quotation from *Dodd*, and for the same reasons does not support the holding in *Collins*.

The last case cited in the opinion in *Collins* is *Gesner v. Roberts*, 48 N.J. 378, 225 A. 2d 697 (1966). This case, as did the *Dodd* case, also involved a construction of a will under New Jersey law. It is not in point.

As already pointed out the repeated generalizations in taxpayer's brief which are similar to the quotations from cases cited in *Collins* and hereinabove discussed do not find support in any specific provision of the Federal Estate Tax Act, and no such provisions have been cited in the brief of taxpayer.

Furthermore, as already pointed out, under the rule in *Riggs*, *supra* (p. 98), it was unequivocally held by the Supreme Court that each state is empowered to govern "the devolution of property at death" and "that Congress intended that the state law should determine the ultimate thrust of the tax". For the District of Columbia, as already shown, the Congress, since 1948 had had many opportunities to change the "devolution of property at death" under the descent and distribution statutes of the District. However, it is incontrovertible, the Congress in its role as the legislative body for the District of Columbia had not made any attempt to create the "equalization" which, pursuant to the rule in *Riggs*, the marital deduction had made possible for the District. See *In re Uihlein's Will*, *supra*, 264 Wisc. 376, 59 N.W. 2d 648; *Moorman v. Moorman*, *supra* 340 Mich. 636, 66 N.W. 2d 248, which acknowledges that other legislative bodies have similarly made no such attempt. Furthermore, it is respectfully submitted that the observation of the Supreme Court of Hawaii in *In re Glovers' Estate*, *supra*, rather clearly expresses the actual intention of the Congress in enacting the marital deduction. Therein that court stated (p. 572, 371 P. 2d, p. 363):

The marital deduction was written into the Internal Revenue Code in 1948 in order to equalize, as nearly as possible, estate and gift tax liability between community property states and common law states. Senate Rep. No. 1013, 80th Cong., 2d Sess. (1948), 1948 U.S. Code Cong.

Serv. Vol. 2, pp. 1188-1191; S. Misc. Rep. II, 80th Cong., 2d Sess. (1948), No. 1055, p. 5. (Emphasis supplied.)

Similarly cogent and in accord is the observation of the Supreme Judicial Court of Maine in *Old Colony Trust Co. v. McGowan*, *supra*. Therein that court stated (p. 147, 163 A. 2d, p. 543):

* * * we [should] further bear in mind that Congress did *not* provide for this equality with the community property states *but only made it possible* for any state to achieve that equality if it was so minded. (Emphasis supplied.)

In view of the foregoing, it is respectfully submitted that the unappealed decision of the United States District Court for the District of Columbia in *In re Estate of Collins*, *supra*, holding that the share of the distributable "surplus" of the intestate's probate assets which her surviving spouse was entitled to receive under the descent and distribution statutes of the District of Columbia is exonerated from the impact of any federal estate taxes (1) is in direct conflict with *Herson v. Mills*, *supra*, (2) is contrary to the laws and statutes as embodied in the jurisprudence of the District of Columbia, and (3) should not be followed by this Court.

CONCLUSION

For the reasons hereinabove stated, the judgment of the court below should be affirmed. 11

Respectfully submitted.

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APPENDIX

District of Columbia Code (1961 ed., Supp. IV):

TITLE 18—DECEDENTS' ESTATES AND THEIR DISTRIBUTION

CHAPTER 1.—LAW OF DESCENTS

§ 18-101. *Course of descents generally.*

On the death of any person seized of or entitled to an interest in an estate in lands, tenements, or hereditaments in the District of Columbia, and intestate thereof, the same shall descend in fee simple to such person's surviving spouse, if any, and kindred, who according to the laws of the District of Columbia now or hereafter in force relating to the distribution of the personal property of intestates, would be entitled to the surplus personal property of such intestate, if he or she had died a resident of the District of Columbia and possessed of such surplus personalty; and such surviving spouse and kindred shall take as tenants in common in the same proportions as are or shall be fixed by such laws relating to personal property. Subject to the rights of dower, such real property shall be liable, in the event of insufficiency of the personal property, for the payment of the intestate's funeral expenses, debts, costs of administration, and estate, inheritance, and succession taxes in the same manner and to the same extent as the personal property of such intestate. * * *

Chapter 2.—DOWER RIGHTS

§ 18-211. *Renunciation of devises and bequests to spouse—* * **

(a) Subject to the provisions of section 18-212 a widow or surviving husband shall by such devise or bequest be barred of any statutory rights or interest she or he may have in the real and personal estate of the deceased spouse or the dower rights provided by

section 18-201a, as the case may be, unless within six months after the will of the deceased spouse is admitted to probate, she or he shall file in the probate court a written renunciation to the following effect:

"I, A B, widow (or the surviving husband of _____, late of _____, deceased, do hereby renounce and quit all claim to any devise or bequest made to me by the last will of my husband (or wife) exhibited and proved according to law; and I elect to take in lieu thereof my legal share of the real and personal property of my said spouse * * *

* * * * *

(e) By renouncing all claim to any and all devises and bequests made to her or him by the will of her husband or his wife pursuant to the provisions of subsection (a) of this section, * * *, the surviving spouse shall be entitled to such share or interest in the real and personal estate of the deceased spouse * * * which she or he would have taken had the deceased spouse died intestate, except that in neither event shall the surviving spouse be entitled to more than one-half of the net estate bequeathed and devised by said will, or, if dower be elected, one-half of the net personal estate bequeathed and dower in the real estate devised.

* * * * *

District of Columbia Code (1961 ed.):

Chapter 5.—CLAIMS OF CREDITORS

§ 18-530. *Distribution of residue.*

Whenever it shall appear by the first or other account of an executor or administrator that all the claims against, or debts of, the decedent which have been known by or notified to him have been discharged or allowed for in his account, it shall be his duty to deliver up and distribute the surplus or residue of the personal estate not disposed of by any will, * * *.

Chapter 6.—SALE OF ASSETS

§ 18-609. *Sale of real estate to satisfy debts and legacies.*

If the said probate court shall be satisfied, upon a report of the auditor, that it is necessary to sell said real estate, or part thereof, it shall authorize the same, or so much thereof as may be necessary for the payment of the debts or legacies, or both, to be sold by the executor or administrator, on such terms as the court may direct. Any surplus of the proceeds of such sale, after payment of debts and legacies and costs of administration, shall be deemed real estate, and shall be distributed among the heirs or devisees as the right may appear.

Chapter 7.—DISTRIBUTION OF SURPLUS—
BENEFICIARIES§ 18-701. *Distribution—When to be made.*

When the debts of an intestate, exhibited and proved or notified and not barred, shall have been discharged or settled, or allowed to be retained for as herein directed, the administrator shall proceed to make distribution of the surplus as provided in this chapter.

§ 18-702. *When surviving spouse entitled to whole.*

If the intestate leave a widow or surviving husband and no child, parent, grandchild, brother, or sister, or the child of a brother or sister of the said intestate, the said widow or surviving husband shall be entitled to the whole.

§ 18-703. *When surviving spouse entitled to one-third.*

If there be a widow or surviving husband and a child or children, or a descendant or descendants from a child, the widow or surviving husband shall have one-third only.

§ 18-704. *When surviving spouse entitled to one-half.*

If there be a widow or surviving husband and no child or descendants of the intestate, but the said intestate shall leave a father or mother, or brother or sister, or child of a brother or sister, the widow or surviving husband shall have one-half.

Internal Revenue Code of 1954:

SEC. 2001. RATE OF TAX.

A tax computed in accordance with the following table is hereby imposed on the transfer of the taxable estate, determined as provided in section 2051, of every decedent, citizen or resident of the United States dying after the date of enactment of this title * * *

* * * * *

(26 U.S.C. 1964 ed., Sec. 2001.)

SEC. 2002. LIABILITY FOR PAYMENT.

The tax imposed by this chapter shall be paid by the executor.

(26 U.S.C. 1964 ed., Sec. 2002.)

SEC. 2033. PROPERTY IN WHICH THE DECEDENT HAD AN INTEREST.

The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of the interest therein of the decedent at the time of his death.

(26 U.S.C. 1964 ed., Sec. 2033.)

SEC. 2051. DEFINITION OF TAXABLE ESTATE.

For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the exemption and deductions provided for in this part.

(26 U.S.C. 1964 ed., Sec. 2051.)

SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

(a) *In General.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—

(1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

(3) to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and no substantial part of the activities of such trustee or trustees, or of such fraternal society, order, or association, is carrying on propaganda, or otherwise attempting, to influence legislation; or

(4) to or for the use of any veterans' organization incorporated by Act of Congress, or of its departments of local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

* * * * *

(26 U.S.C. 1964 ed., Sec. 2055.)

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) *Allowance of Marital Deduction.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.*—

* * * * *

(4) *Valuation of interest passing to surviving spouse.*—In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

* * * * *

(26 U.S.C. 1964 ed., Sec. 2056.)

SEC. 2205. REIMBURSEMENT OUT OF ESTATE.

* * * it being the purpose and intent of this chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(26 U.S.C. 1964 ed., Sec. 2205.)

SEC. 6324. SPECIAL LIENS FOR ESTATE AND GIFT TAXES.

(a) *Liens for Estate Tax.*—Except as otherwise provided in subsection (c) (relating to transfers of securities)—

(1) *Upon gross estate.*—Unless the estate tax imposed by chapter 11 is sooner paid in full, it shall be a lien for 10 years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

* * * * *

(26 U.S.C. 1964 ed., Sec. 6324.)

H. Rep. No. 304, 85th Cong., 1st Sess., pp. 1-3:

MODIFYING THE CODE OF LAW FOR THE DISTRICT OF COLUMBIA TO PROVIDE FOR A UNIFORM SUCCESSION OF REAL AND PERSONAL PROPERTY IN CASE OF INTESTACY, TO ABOLISH DOWER AND CURTESY, AND TO GRANT UNTO A SURVIVING SPOUSE A STATUTORY SHARE IN THE OTHER'S REAL ESTATE OWNED AT TIME OF DEATH

The Committee on the District of Columbia, to whom was referred the bill (H.R. 6508) to modify the Code of Law for the District of Columbia to provide for a uni-

form succession of real and personal property in case of intestacy, to abolish dower and curtesy, and to grant unto a surviving spouse a statutory share in the other's real estate owned at time of death, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill, H.R. 6508 do pass.

The purpose of this bill is to modify the Code of Law for the District of Columbia to provide for a uniform succession of real and personal property in case of intestacy, to abolish dower and curtesy, and to grant unto a surviving spouse a statutory share in the other's real estate owned at time of death, and for other purposes.

This bill would make substantial changes in the law relating to the descent of real property when the owner dies intestate. Rights in property known as dower and curtesy are abolished and in lieu thereof each spouse is given a statutory right to share in the deceased spouse's property.

Husbands and wives will be especially affected because the bill proposes to abolish the ancient, feudal rights in realty known as dower and curtesy. Today a healthy widow under 30 years old would get only one-sixth part of the value of any realty of which her husband died intestate. If she were above 77 years old, she's get only one-twentieth part of that value. Under this bill, she would instead take, in either such case, at least one-third and perhaps all the husband's realty, outright, depending upon whether he was survived also by a child or other direct descendants, or only by relatives or more remote degree.

The bill would abolish all present distinctions as between the order of succession in the descent of real property and the distribution of personal property of an intestate. The bill provides that real property shall descend in the same order as personal property, under present law, is distributed. The laws in all States of the Union except Delaware, North Carolina, and Tennessee, provide for uniformity in succession of real and personal property.

Husband and wife domiciled in this District will, under this legislation, acquire exactly reciprocal or equal

rights of inheritance to all property of any kind owned by the one first dying with the possible exception of real estate owned at death but located outside the District of Columbia, which would be governed by the law of its location.

* * * * *

SECTION-BY-SECTION ANALYSIS

Section 1

Section 940 of act entitled "An act to establish a code of laws for the District of Columbia," approved March 3, 1901, as amended (18-101, D.C. Code, 1951 edition), is further amended.

Makes realty descend exactly as personalty now does, including the share to spouse.

* * * * *

Section 5

Amends section 1172 of said code of law (sec. 18-210, D.C. Code, 1951 edition), to extend the present presumption (that any devise or bequest to the widow was intended in lieu of both dower and share of personalty unless otherwise expressed in will) to make the same presumption apply to the old personalty share and to the new realty share and, also, to make the presumption apply to both spouses.

The net effect is to make every surviving spouse (widow or widower), who is given anything under the will of the deceased spouse, renounce if he or she prefers to take her or his intestate share.

Section 6

(1) Amends section 1173 of said code of law, as amended (sec. 18-211, D.C. Code, 1951 edition) (a) to bar either surviving spouse unless he or she renounces anything given him or her by the will of the deceased spouse; and (b) permits husband to renounce as to realty. (It revises renunciation form to fit new mutual situation, which treats widow and widower alike. It gives either spouse statutory rights in real and personal property by renunciation.)

The effect is that by renouncing either spouse surviving (widow or widower) can take her or his full statutory

share of the real or personal property of the deceased spouse.

H. Rep. No. 679, 87th Cong., 1st Sess., pp. 1-4:

AMENDING THE CODE OF LAW FOR THE DISTRICT OF COLUMBIA SO AS TO PROVIDE A NEW BASIS FOR DETERMINING CERTAIN MARITAL PROPERTY RIGHTS

The Committee on the District of Columbia, to whom was referred the bill (H.R. 7265) to amend the code of law for the District of Columbia so as to provide a new basis for determining certain marital property rights, * * *

H.R. 7265, amending the code of law for the District of Columbia to provide a new basis for determining certain marital property rights and for other purposes will: (1) correct deficiencies in the act of Congress approved August 31, 1957 (71 Stat. 560), providing for a uniform succession of real and personal property, * * * (4) clarify provisions relating to renunciation by the surviving spouse, and (5) limit the interest such spouse may take against the will of the deceased spouse.

The 1957 act established a uniform succession to real and personal property by providing that real estate should descend to the decedent's spouse and kindred in the same manner as the personal estate, i.e., that on intestacy the same persons take the real estate, and in the same shares, as they are entitled to the surplus personal property according to the statute of distribution now or hereafter controlling.

Under the law as it now stands, a wife owning substantial real and personal property of her own, and having no relatives closer than nephews and nieces, cannot make a will which will be effective and certain to dispose of any part of her estate other than to her husband because if he survives her he can renounce the will and take her entire estate.

The particular purpose and effect of each section of H.R. 7265 and its relation to the overall remedial design of the bill will appear from the detailed consideration of the sections seriatim as follows:

Section 1 simply identifies the new law as the Marital Property Rights Amendments of 1961 for purposes of reference in certain code sections as they will be amended by this legislation.

Section 2 is substantially the same as in the 1957 law. It establishes a uniform succession of both real and personal property, but expressly provides for the payment of debts, administration expenses and taxes out of the decedent's real property if there is a deficiency of personal property.

* * * * *

Section 4 supplies omissions and eliminates ambiguities in existing provisions of the District of Columbia Code relating to renunciation of devises and bequests, makes such right of renunciation applicable to both spouses and limits the interest of the surviving spouse upon renunciation. * * *

* * * * *

Subsection (e) provides a limitation on the share the surviving spouse filing a renunciation can receive in derogation of the will. There has been substantial criticism of the present law in that, on renunciation, the surviving spouse can in the circumstances of no relatives closer than nephews and nieces, take the entire estate of the deceased spouse and thus wholly defeat the testator's intentions. The bill limits the renouncing spouse to one-half of the net estate, or in the case of election of dower in lieu of the legal share of the real property, to one-half of the net personal property and dower in the real property. A search of the law in the leading common law States in the East and South discloses no other jurisdiction in which the renouncing spouse is permitted to take the entire estate of the deceased spouse against his or her will. This limitation to one-half of the net estate is consistent with the law in most States, including Maryland and Virginia.

* * * * *

S. Rept. No. 612, 89th Cong., 1st Sess., pp. 1, 3-4, 5, 25, 26, 29, 47, 52:

PART III, DISTRICT OF COLUMBIA CODE, "DECEDENTS' ESTATES AND FIDUCIARY RELATIONS"

The Committee on the Judiciary, to which was referred the bill (H.R. 4465) to enact part III of the District of Columbia Code, entitled "Decedents' Estates and Fiduciary Relations," codifying the general and permanent laws relating to decedents' estates and fiduciary relations in the District of Columbia, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

* * * * *

The reasons and justification for the revision and codification of Part III of the District of Columbia Code are contained in House Report 235 on H.R. 4435 and are set forth as follows:

The purpose of this bill is to revise, codify, and enact into law Part III of the District of Columbia Code. The work was undertaken as a part of the project for a new edition of the Code. The first major step of the Committee on the Judiciary in this project, the revision and codification of Part II of the Code, entitled "Judiciary and Judicial Procedure," was enacted as Public Law 88-241.

The primary purpose of this revision is to substitute plain language for awkward terms, reconciliation of conflicting laws, omission of obsolete, superseded, or repealed sections, consolidation of similar provisions, and improvement in the style and arrangement of the material.

It is not the purpose to make substantive changes in the law. While, in a few sections, changes have been made which might at first comparison be considered "substantive," actually it is intended to reflect in those changes only what apparently was the legislative intent, or is implied in the provisions themselves, or has been stated by the courts in construing the sections. In

each case the revision note to the section points out the change and the reason therefor.

This revision is based upon Part III of the 1961 edition of the District of Columbia Code, and supplements, with the addition of a few provisions from other parts which are transferred to improve the arrangement of the Code as a whole.

Before actual revision was begun the following materials were assembled:

1. The complete text of Part III, District of Columbia Code, 1961 edition, and the latest cumulative supplement (Supp. IV).
2. Applicable constructions of the courts.
3. The volumes of the Statutes at Large, for purposes of comparison.
4. Other background materials.

HISTORY

The last code of laws for the District enacted by Congress was that of 1901, as set out in Act March 3, 1901, chapter 854, 31 Stat. 1189. All "codes" published since that time, including the 1961 edition, were consolidations only, and were not enacted by Congress as the basic law of the District.

Actually, the 1901 Code did not contain all the local law applicable in the District at that time. By its own terms (sec. 1 of the act; D.C. Code, 1961 ed., sec. 49-301), in addition to providing for the applicability of the common law, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District, all acts of Congress by their terms applicable to the District and to the other places under the jurisdiction of the United States, in force in the District on March 3, 1901, it provided that all British statutes in force in Maryland on February 27, 1801, should also be applicable in the District "except insofar as the same are inconsistent with, or replaced by, subsequent legislation of Congress." It still so provides. Further, there were a number of prior acts relating to the District the provisions of which were not carried into or repeated in that Code, and which were specifically or impliedly saved

from repeal (unless inconsistent with or replaced by the provisions of the Code) by section 1636 of the 1901 act (31 Stat. 1435). Consequently, later code compilations have been based, not only on the 1901 Code, as amended or supplemented, but also on all prior acts, including sections of the Revised Statutes of the District of Columbia, the Revised Statutes of the United States, and British statutes, which the codifiers considered as still being in force in the District. Some of the British statutes date back to the 13th century.

Over 60 years have passed since the laws relating to the District were overhauled and enacted as a code. Some of the British statutes set out in the 1961 compilation, and prior compilations, while they may have been considered as technically being in force in the District, not only are archaic in language but actually can have no present application in the District, or are obsolete. Others, like many of the other provisions of the 1901 Code and of later independent acts relating to the District, have been repealed, superseded, or affected in some way by subsequent legislation.

There is an urgent need for a new reconciliation and codification of the laws relating to the District, and the revision contained in this bill is the second step in that direction, the revision and codification of Part II of the Code having been the first.

* * * * *

ARRANGEMENT, NUMBERING, AND STYLE

The revision contains the same number of titles as contained in Part III of the 1961 edition of the Code, and uses the same style of section numbering, but chapters within titles are given odd numbers only, leaving even numbers for use in future expansion.

Within the Part as a whole, however, there are transfers of provisions between chapters and titles for the purpose of rearranging the provisions into what was considered a more logical order of subsequent matter and of following the more modern arrangement of similar laws in other jurisdictions. Further, with the same ultimate purpose in view, some sections have been consolidated, and others have been divided respectively in-

to two or more sections or subdivided into subsections.

In addition, every effort has been made to simplify and clarify the language according to the more modern concepts of style.

* * * * *

SECTION 19-113.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-211 (Mar. 3, 1901, ch. 854, § 1173, 31 Stat. 1376; Apr. 19, 1920, ch. 153, 41 Stat. 567; Aug. 31, 1957, Pub. L. 85-244, § 6, 71 Stat. 561; Sept. 14, 1961, Pub. L. 87-246, § 4, 75 Stat. 516).

* * * * *

Based on D.C. Code, 1961 ed., § 18-101 (Mar. 3, 1901, ch. 854, § 940, 31 Stat. 1342; Mar. 6, 1935, ch. 28, § 3(A), 49 Stat. 39; Aug. 31, 1957, Pub. L. 85-244, § 1, 71 Stat. 560; Sept. 14, 1961; Pub. L. 87-246, § 2, 75 Stat. 515).

* * * * *

The provisions of section 18-101 of D.C. Code, 1961 ed., as carried into this section, reflect, with changes in phraseology and arrangement, the amendment thereof by the 1961 Act.

SECTION 19-302.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-702 (Mar. 3, 1901, ch. 854, § 374, 31 Stat. 1249; Apr. 19, 1920, ch. 153, § 1, 41 Stat. 563).

Changes are made in phraseology.

SECTION 19-303.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-703 (Mar. 3, 1901, ch. 854, § 375, 31 Stat. 1249; Apr. 19, 1920, ch. 153, § 1, 41 Stat. 563).

Changes are made in phraseology.

SECTION 19-304.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-704 (Mar. 3, 1901, ch. 854, § 376, 31 Stat. 1249; Apr. 19, 1920, ch. 153, § 1, 41 Stat. 563).

Changes are made in phraseology.

* * * * *

SECTION 20-1108.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-609 (Mar. 3, 1901, ch. 854, § 148, 31 Stat. 1214).

Changes are made phraseology.

* * * * *

SECTION 20-1328.—SECTION REVISED

Based on D.C. Code, 1961 ed., § 18-530 (Mar. 3, 1901, ch. 854, § 359, 31 Stat. 1247).

Changes are made phraseology.

* * * * *

FOOTNOTE 15 REFERENCE IN TEXT

Maryland and Virginia, we will presently show here, at different times adopted differing, varied and inconsistent apportionment statutes. In Maryland the original apportionment statute enacted in 1937 provided for the "apportionment of the Federal estate tax [only] against *inter vivos* transfers includible in the taxable estate." Thereafter, in 1947, this statute was first amended so as to provide that "the widow's share of the nonprobate estate was exonerated, but her share of the probate assets continued to bear a [federal estate] tax burden." However, "If the wife renounced the will, there was no exoneration" even as to nonprobate assets. (Appendix C to Taxpayer's Br., p. 21.) Moreover, as herein pertinent, in *Weinberg v. Safe Deposit & Trust Co.*, 198 Md. 539, 85 A. 2d 50 (1951), in which, as in the case at bar, a widow had disavowed the will of her husband, the Court of Appeals of Maryland expressly refused, by judicial fiat, to create a rule of apportionment which would exonerate from federal estate taxes the property passing from decedent to his surviving spouse. Six years after the decision in *Weinberg*, to wit, in 1957, the Maryland apportionment statute was amended for a *second* time. It now provided that "a widow electing against the will was exonerated [only] as to nonprobate assets." (Appendix C to Taxpayer's Br., p. 21.) In the case at bar, the decedent's non-probate assets are about 0.44 per cent of decedent's probate assets and no part of these non-probate assets had passed to decedent's surviving spouse.

during the period from 1937 until 1961. We will present

(JA 34-35.) Even the Maryland statute as thus amended in 1957 would not have permitted taxpayer to achieve its end in the case at bar. It was not until 1965, when Maryland amended its apportionment statute for a *third* time, that it provided "for full exoneration of property passing to a surviving spouse to the extent it qualifies for the marital deduction." (Appendix C to Taxpayer's Br., p. 21.) Taxpayer is urging this Court, we submit, unmeritoriously, by judicial fiat to create and adopt an apportionment rule which the legislature of Maryland finally adopted, it is indisputable, only after twenty-seven years of haggling over public policy.

In Virginia the original apportionment statute was enacted in 1946. In 1952 it was amended for the *first* time. As thus amended it expressly provided that the apportionment rule "did *not* apply with respect to the benefit of the marital deduction allowable." (Emphasis supplied.) (Appendix C to Taxpayer's Br., p. 29.) In 1954 this apportionment statute was amended for the *second* time. It provided that the "Federal estate tax is apportionable against the marital deduction allowance." (Appendix C to Taxpayer's Br., p. 29.) Of course, under the rule in *Riggs*, state legislatures have the power to enact such statutes and as we have demonstrated in Appendix *infra*, pp. 76-78, state legislatures frequently have exercised such power *only after* the highest court of the particular state has refused by judicial fiat to adopt and create such rules of apportionment. In essence, taxpayer is asking this Court in effect to usurp the prerogatives of the legislature, which it is apparent courts have refused to do.

FOOTNOTE 16 REFERENCE IN TEXT

As we have indicated above, it appears that about twenty-nine states have adopted apportionment statutes and it is *incontrovertible that these apportionment statutes differ from each other*. (See Appendix C to Taxpayer's Br., pp. 17-30.) As already pointed out, *supra*, *only* North Dakota has adopted the Uniform Estate Tax Apportionment Act and that occurred in 1967. In Appendix, *supra*, pp. 75-76, we have shown the differences in the apportionment statutes of Maryland and Virginia during the period from 1937 until 1965. We will present-

ly set forth the material differences in the apportionment statutes of the other twenty-six states and show that most of these apportionment statutes were enacted only after the courts of the respective states had refused by judicial fiat to create and adopt a rule of apportionment of federal estate taxes.

The apportionment statutes of Alabama and Iowa expressly prohibit "apportionment of the Federal estate tax absent testamentary direction" "to the contrary." (Appendix C to Taxpayer's Br., pp. 17, 19.)

The apportionment statute of Massachusetts "provides for apportionment as to nonprobate assets but no apportionment as to probate assets." (*Id.*, p. 21.)

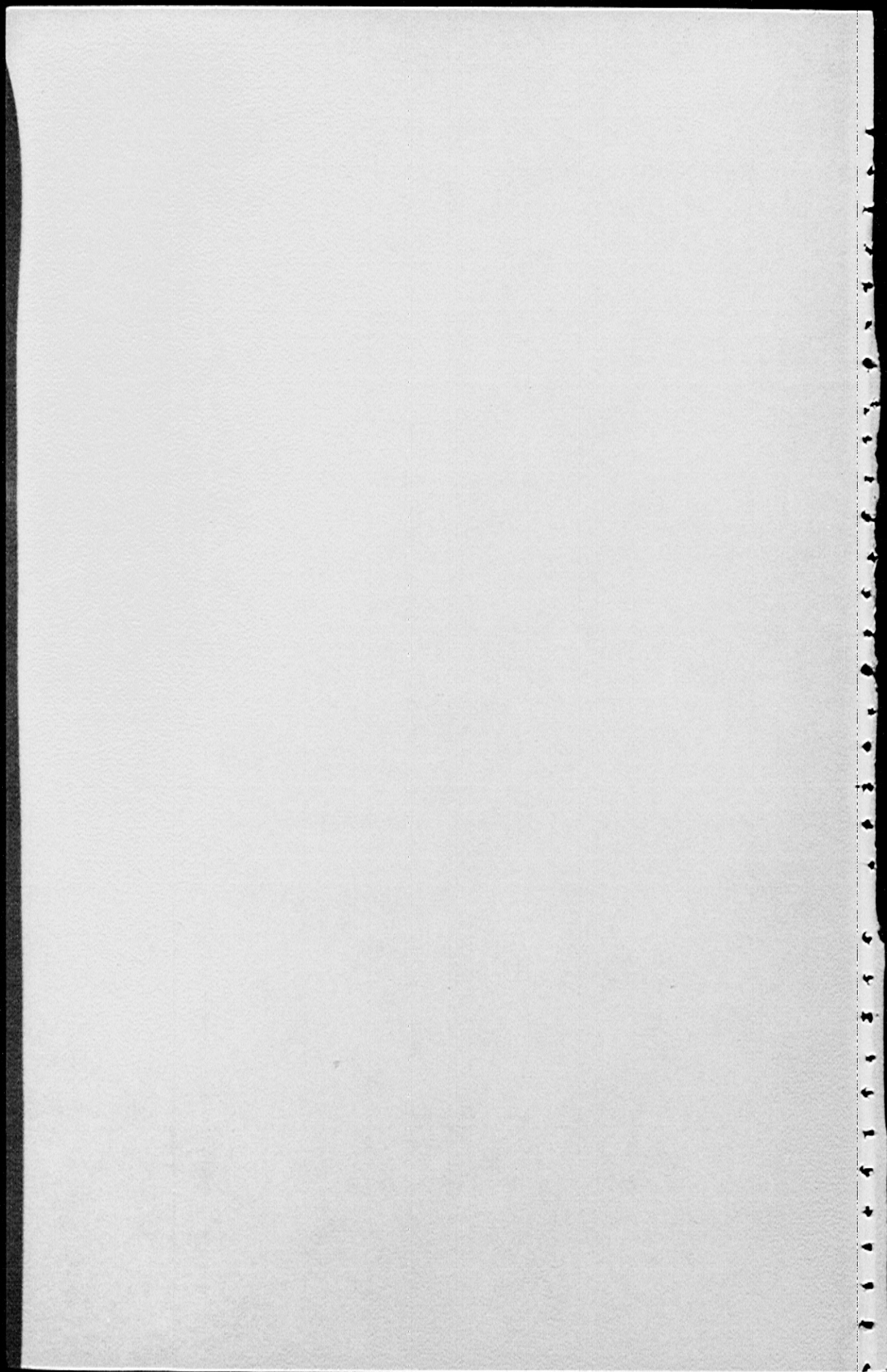
The apportionment statute of Kansas provides only for the "apportionment of 'state estate tax'." (*Id.*, p. 20.)

North Carolina and Oregon adopted apportionment statutes which are "limited to [a] widow electing against the will and provides that to the extent her share qualifies for the marital deduction under the Federal estate tax law, it is free of estate tax." (*Id.*, pp. 25, 27.) Taxpayer concedes that the North Carolina statute was enacted "Obviously to overcome the *Wachovia* decision [*Wachovia Bank and Trust Co. v. Green*, 236 N.C. 654, 73 S.E. 2d 879 (1953)]" (*Id.*, p. 25), which is on all fours with the case at bar. In *Wachovia*, the Supreme Court of North Carolina had expressly refused by judicial fiat to create and adopt a rule for apportioning federal estate taxes. Furthermore, taxpayer concedes (Br. 23) that in *Wachovia* that court held that the word "surplus" "as adopted by the State Legislature [which is also written into the statutes of the District of Columbia], meant that which remained of the estate after payment of 'all expenses of administration and debts including taxes'; stated that the subsequent 1948 Federal statute could not in any way change the meaning of an enactment of the State Legislature; and concluded that whether any change should be made in the manner of distribution to the widow 'is a matter for the General Assembly.'"

The apportionment statutes in California, Connecticut, Louisiana, Massachusetts, Michigan (*Moorman v. Moorman*, 340 Mich. 636, 66 N.W. 2d 248 (1954), *supra*), Minnesota, New Hampshire (Br. 13), New York (Br.

10), Oklahoma, Pennsylvania (Br. 11), South Dakota, Tennessee, and West Virginia were enacted *only after* the courts of those respective states had by judicial fiat refused to declare and adopt a rule of apportionment (Appendix C to Taxpayer's Br., pp. 17, 18, 20, 21-22, 22, 26-27, 28, 29, 30).

Other differing apportionment statutes were also enacted at various times by the Legislatures of Arkansas, Florida, Delaware, Nebraska, Nevada, and Wyoming. (Id., pp. 17, 18, 23, 30.)



REPLY BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21055

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OF CHARLES DELMAR, DECEASED, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

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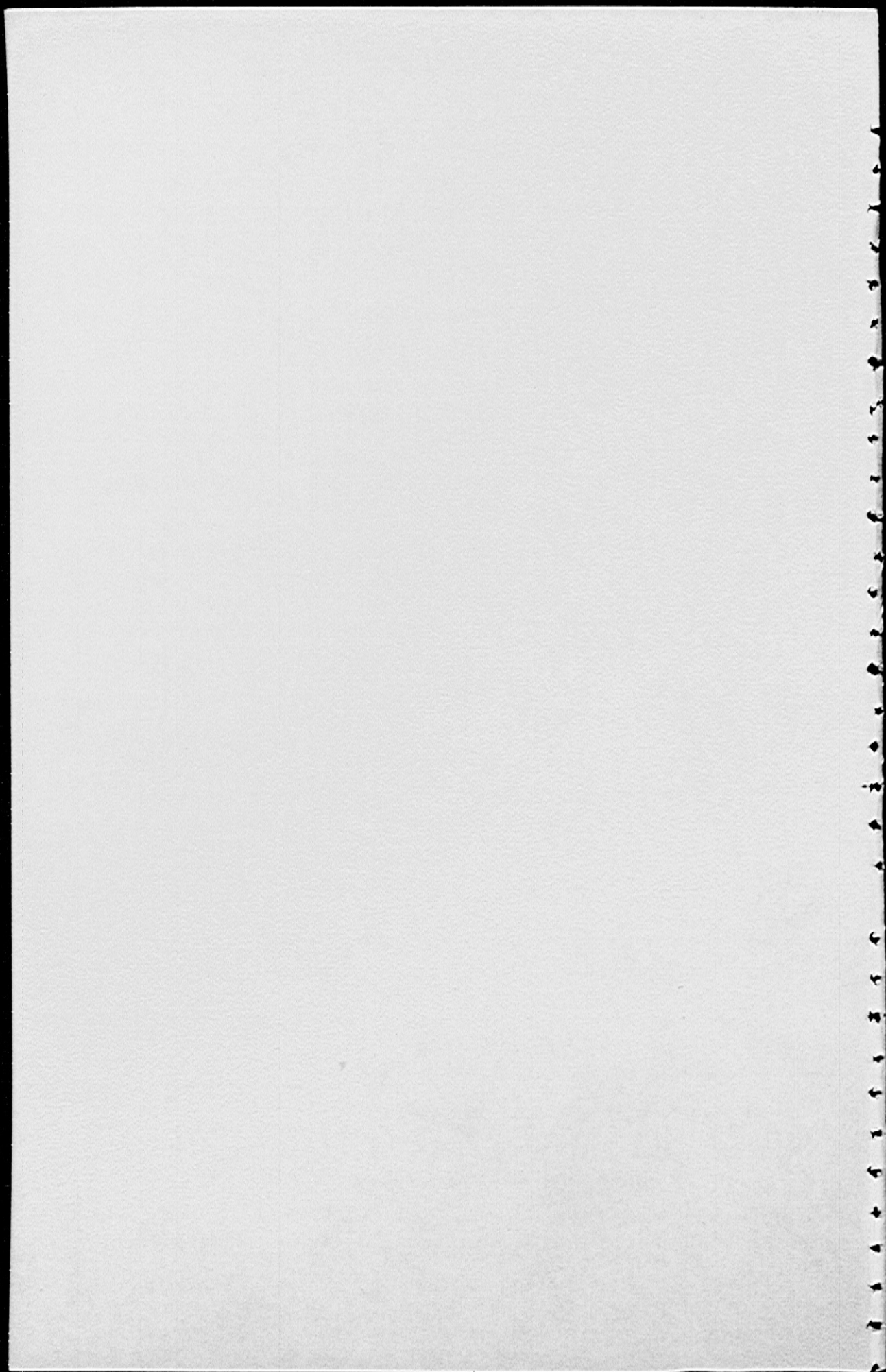
Washington, D. C. 20006

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 26 1967

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v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal From Order and Judgment of the United States
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REPLY BRIEF FOR APPELLANTS

COUNTERSTATEMENT OF CASE

In its brief (hereinafter referred to as "Br.") at page 3, the Government* asserts the Taxpayer's* position herein to be that the share of the surviving spouse is one-third of the surplus remaining *prior* to the deduction of funeral expenses, debts, claims, administration expenses and federal and District of Columbia estate taxes. In this, the Government patently errs; the position of the Taxpayer is that, to conform to the Congressional intent, the share of the surviving spouse is to be determined *after* deducting funeral expenses, debts, claims and administra-

* Appellee is herein referred to as the "Government" while Appellants are referred to as the "Taxpayer."

tion expenses, but *before* federal and District of Columbia estate taxes.

On page 4, the Government refers to the "legal share of the decedent's probate assets which the executors distributed * * *." Nothing in the record indicates that any distribution has been made to the surviving spouse.

Also on the same page in footnote 7, the Government asserts that the testamentary provision for the surviving spouse was a trust "with a *limited* power of appointment." The record (JA 31) indicates that such power of appointment was a *general* one.

On page 6, the Government, after quoting by way of footnote certain colloquy between the bench and counsel, continues that "no opinion was written by the court below" indicating a brusque dismissal of Taxpayer's motion. That the Court, notwithstanding its prior decision in *Herson v. Mills*, was in complete sympathy with the Taxpayer's position is indicated by its following statements (JA 49):

"The Court: * * * I think they ought to treat common law jurisdictions exactly the same as they do the others, but—"

and (JA 48):

"The Court: As for the Court making a rule about apportioning the federal estate tax, one of our Judges in a case a short time ago thought that a stepchild was an heir of a decedent and this question went to the Court of Appeals.

"In the interval between the decision in the District Court and the time the Court of Appeals reversed, however, petitions were received in the Probate Office in estates where people who were stepchildren of the decedent were claiming to be heirs.

"* * * This caused confusion and uncertainty.

"I mention this because in the instant case a decision that the Court may apportion the estate tax and exempt the widow from sharing the tax would mean that the

decision in this particular case would have to be dealt with in other cases in the Probate Office before the matter could be passed upon by the Court of Appeals.

"I think, *under the circumstances*, that I will have to deny your motion, Mr. Brown." (Italics supplied.)

ARGUMENT

Stripped of repetitious verbiage, the Government's position, with respect to District of Columbia decedents, may be distilled into five propositions:

(a) That the federal estate tax, under common law principles, "is in the nature of an administration expense" which, in intestate estates, must be set off before the shares of the distributees may be determined;

(b) That the Congress has approved such for the District of Columbia by its failure to enact a statute specifically providing for a different result;

(c) That in the absence of a Congressional enactment of such a local statute, the local courts cannot reach a contrary result;

(d) That the 1961 amendments to the provisions of the local descent and distribution statutes establish a Congressional intention that the share of a surviving spouse is to be burdened by a part of the federal estate tax; and

(e) That *In re Estate of Collins*, 269 F. Supp. 633 (1967), reaching a contrary result, was erroneously decided.

In support of its propositions, the Government repeatedly and in various contexts treats as being controlling certain *state* court decisions dealing with the meaning of terms contained in various *state* statutes of descent and distribution. In so doing, the Government fails to give recognition to the distinction between the relationship of the

Congress to the local laws of the various states and its relation to the District of Columbia with respect to the local laws of the same.

Replying to the Government's contentions, and, in so doing, following the format of the latter's brief, Taxpayer would note the following:

A. The Government Asserts That the Federal Estate Tax Is Imposed Solely on the Decedent's Interest in Property Which Has Ceased by Reason of His Death. (Br. 11-12)

With this principle, Taxpayer has no disagreement but asserts that it is without significance. Thus, in the 34 states (Taxpayer's Br. 22), where by decision or local statute the share of the surviving spouse is exonerated from the tax, this principle is *also there* applicable.

B. The Government Asserts That the Federal Estate Tax Is a Lien Which Attaches to the Decedent's Gross Estate at the Precise Moment of His Death. (Br. 12)

With this principle, which is also without significance, Taxpayer expresses no disagreement but would again note that the *same* principle is applicable in the 34 states where the share of the surviving spouse is exonerated from the tax.

C. The Government Asserts That the Federal Estate Tax Due From the Estate of an Intestate Decedent "Is of the Nature of an Administration Expense" Which, Under the Common Law Prevailing in the District of Columbia, as Enunciated in *Hepburn v. Winthrop*, *Infra*, Is To Be Paid by the Administrator Substantially as Other Charges Are Paid Prior to Ascertainment of the Intestate Share and Its Distribution. (Br. 13-18)

In this connection, Taxpayer would first correct the untrue assertion made by the Government (Br. 14-15) that Taxpayer contends that *Riggs v. Del Drago* "has nullified * * * the decision of this Court, *Hepburn v. Winthrop*, * * *." Taxpayer, at pages 14-15 of its brief, asserted

nothing more than that the "basis" of that decision was destroyed "at least to the extent of its reliance upon" certain decisions, the bases of which were "nullified" by the Supreme Court in *Riggs v. Del Drago*, and its reliance upon the "necessary inference" resulting from the statutory provision that the tax is to be paid by the executor before distribution, which inference was totally discredited by the same Supreme Court decision. Nor does Taxpayer retreat from *that* position—for if *Hepburn v. Winthrop* is to stand for a *general* rule against apportionment, the result must be supported by a different line of reasoning than that upon which the Court therein rested its conclusion.

Taxpayer admits, as it must, that in a proceeding involving a *testate* estate and *not* involving the marital deduction provision, this Court, in *Hepburn v. Winthrop*, in refusing to apportion to realty any of the federal estate tax, characterized the latter as being "of the nature of" an administration expense. In so doing, however, it merely applied the general rule that, in default of testamentary provision to the contrary, debts, charges and other just obligations of an estate, including expenses of administration, must be paid out of the residue of the property to which the executors or administrators take title. The Court continued that (83 F. 2d at 573):

"* * * in the absence of anything in the [taxing] statute creating the exception urged here and in the absence of any provision in the will directing a contribution from the real estate and in the absence of a local statute on the subject, it is clear that the payment of the tax [must be made] out of the personal residuary estate * * *."

Such cannot be the basis of a decision herein.

With respect to the "splitting" provisions adopted for federal estate and gift tax purposes by the Revenue Act

of 1948, H. Rept. No. 1274, 80th Cong., 2nd Sess. (1948-1 C.B. 241, 244), states that:

“* * * In effect, these amendments represent the adoption of a *new national system for ascertaining Federal estate and gift tax liability*. * * *” (Italics supplied.)

and (*ibid.*, p. 261) that:

“* * * In the case of the estate tax, ‘splitting’ means an *exemption** in common-law States of up to one-half of the decedent’s estate if it passes outright to the surviving spouse. * * *” (Italics supplied.)

It is incontrovertible, therefore, that the Congress legislated to the end that there be uniform estate tax treatment for residents of common law and community property states *for the purpose of correcting inequities and to provide for tax equalization*. S. Rept. No. 1013, 80th Cong., 2nd Sess. (1948-1 C.B. 285). This intent has been repeatedly recognized by the United States Supreme Court. Thus, in *United States v. Stapp*, 375 U.S. 118, 128 (1963), the Court stated as follows:

“* * * The 1948 tax amendments were *intended to equalize the effect of the estate taxes* in community property and common-law jurisdictions. Under a community property system, such as that in Texas, the spouse receives outright ownership of one-half of the community property and only the other one-half is included in the decedent’s estate. To equalize the incidence of progressively scaled estate taxes and to adhere to the patterns of state law, *the marital deduction permits* a deceased spouse, subject to certain requirements, to *transfer free of taxes one-half of the non-community property to the surviving spouse*. * * * *the primary thrust of this is to extend to tax-*

* Substantially so treated in *In re Estate of Rooney*, 186 Kan. 200, 349 P. 2d 916 (1960), as to which see *First National Bank of Topeka, Kansas v. United States*, 233 F. Supp. 19, 28-29 (D.C. Kan. 1964). Taxpayer submits that the term “exemption” is particularly descriptive of the Congressional intention with respect to the District of Columbia.

payers in common-law States *the advantages* of 'estate splitting' otherwise available only in community property States. * * *'' (Italics supplied.)

The Court in *Jackson v. United States*, 376 U.S. 503, 510 (1964), stated that:

"* * * the general goal of the marital deduction provisions was to *achieve uniformity of federal estate tax impact* between those States with community property laws and those without them. * * *'' (Italics supplied.)

In *Northeastern Pennsylvania National Bank & Trust Company v. United States*, ... U.S. ..., 18 L. ed. 2d 726, 731, 732 (1967), that Court, in the following language, reiterated that Congressional purpose:

"* * * The deduction [marital] was enacted in 1948, and the underlying purpose was to *equalize the incidence of the estate tax* in community property and common-law jurisdictions. Under a community property system a surviving spouse takes outright ownership of a half of the community property, which therefore is not included in the deceased spouse's estate. *The marital deduction allows transfer of up to one-half of noncommunity property to the surviving spouse free of the estate tax.* * * *

"Congress' intent to afford a liberal 'estate-splitting' possibility to married couples, where the deductible half of the decedent's estate would ultimately—if not consumed—be taxable in the estate of the survivor, is *unmistakable.* * * *'' (Italics supplied.)

It is a cardinal rule of statutory construction that that which arises by plain and clear implication from legislation is as much a part thereof "as if the implication had been embodied in so many words." See *McHenry v. Alford*, 168 U.S. 651, 652 (1898), and *Wilson County v. Third National Bank of Nashville*, 103 U.S. 770, 778 (1881). The

"unmistakable" intent and purpose of the Congress to make available to all common-law jurisdictions—including the District of Columbia—full uniformity of federal estate tax impact with that prevailing in community property states serves to distinguish any principle resting on *Hepburn v. Winthrop* from the situation here involved, since here there is no "absence of anything in the [taxing] statute creating the exception urged." While achievement of full uniformity,* as the result of *Riggs v. Del Drago*, necessarily depends, as to the several states, upon application of their local law, it is unbelievable that the Congress did not intend such full uniformity to be achieved with respect to District of Columbia decedents. To hold to the contrary requires the singular conclusion that with respect to its "local" inhabitants, Congress, in a single statutory pronouncement intending to give, inadvertently failed to do so, or that it simultaneously gave and took away.

Nor is this Court, by *Hepburn v. Winthrop*, prevented from achieving, in application, the Congressional intent merely because the Congress failed to enact an apportionment statute for the District of Columbia clearly spelling out how its intent, with respect to the marital deduction allowance, was to be here achieved.

As stated in *In re Gallagher's Will*, 57 N.M. 112, 255 P. 2d 317, 37 A.L.R. 2d 149, 162 (1953):

"* * * there is nothing in the Act of Congress to hamper the state [District of Columbia] courts, in the exercise of their jurisdiction over the administration and settlement of estates, from applying equitable rules whereby, as the result of case law, equitable apportionment of this tax is accomplished * * *."

* And such achievement has been defeated in several states (Br. 17, fn. 12) predicated upon reasoning not here applicable as to which see Taxpayer's brief (pp. 22-23).

Thus, in the language of *Gesner v. Roberts*, 212 A. 2d 43, 49 (Super. Ct. N. J. 1965), *aff'd* 225 A. 2d 697 (Sup. Ct. of N.J. 1967):

"It would seem then the *Congress* in granting to the states [and to the District] the right to determine where the burden of federal estate taxes should lie, *implicitly expected* that common law states [jurisdictions] such as ours would determine either by legislation or *judicial decision* that the *full* benefit of the marital deduction would be accorded where applicable to the surviving spouse. * * *" (Italics supplied.)

Further, in the language of *Pitts v. Hamrick*, 228 F. 2d 486, 489 (4 Cir. 1955):

"* * * There is no reason why the apportionment may not be made by the courts of the state [District] in application of what they conceive to be the requirements of state [District] law in the premises as well as by its legislature. * * *"

See also *Seymour National Bank v. Heideman*, 278 N.E. 2d 771 (Ind. 1961).

In conclusion on this point, Taxpayer submits that the Congress having the sole power to decide what the policy of the District of Columbia law shall be and having indicated its will, however indirectly, that will should be recognized and obeyed by the courts. As stated by the Supreme Court in *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 118 (1957):

"* * * it will not do for us to tell the Congress 'We see what you were driving at but you did not use choice words to describe your purpose.'"

See also Taxpayer's Br. 31-32.

D. 1. The Government Asserts (Br. 18-21) That It Is Clearly the Congressional Purpose and Intent That the Federal Estate Tax Should Be Paid by the Executor or Administrator "Before Making Any Distribution" of the Probate Assets "Unless Such Taxes Are Otherwise Provided For in the Will or Apportioned Under a Pertinent State Statute."

To this enigmatic assertion, the Taxpayer agrees it to be the Congressional intent that "so far as is practicable" the tax "shall be paid out of the estate before its distribution." The instant issue, however, involves not *when* distribution should be made but *whether* the estate tax payment will effect the amount *distributable* to the surviving spouse of a District of Columbia intestate. As to the latter, while a "pertinent state statute" will have effect *where such a state* problem is involved, the instant problem deals *not* with a state but with the District of Columbia for which the Congress is also the local legislature.

In support of its assertion, the Government (Br. 18) cites section 2205 of the 1954 Code [section 826(b) of the 1939 Code] as authority for the proposition that "unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution." It is submitted, however, that this statutory provision has no significance on the question of *whether* the estate tax payment will effect the amount *distributable* to a surviving spouse.* That section, said *Riggs v. Del Drago*, "does not command that the tax is a non-transferable charge" on any particular property and that to read the phrase "the tax shall be paid out of the estate" as meaning "the tax shall be paid out of" any particular portion of the estate "is to distort the plain language of the section and to create an obvious fallacy."

On this point, the Government concludes with the proposition (Br. 21) that since the Congress had the

* This conclusion was reached in *Hampton v. Hampton*, 188 Ky. 199, 221 S.W. 496, 10 A.L.R. 515, 517 as early as 1920 in apportioning the estate tax liability of an intestate.

power, with respect to the District of Columbia, to enact an apportionment statute exonerating the share of the surviving spouse from the tax impact and has "chosen *not to*" do so, the Congressional intention is clear that no such exoneration shall prevail in the District of Columbia.

It is clear that here, as in *Northeastern Pennsylvania National Bank & Trust Company v. United States, supra*, resolution of the question presented is either "essentially" (Majority Op.) or "exclusively" (Dissenting Op.) a matter of discovering the intent of Congress. It is submitted that to sustain the Government's position herein, on the failure of the Congress to adopt for the District of Columbia an apportionment statute, is to disregard the clear and unquestioned purpose underlying the enactment of the marital deduction provision (as applicable in the District of Columbia) and to characterize the Congress as either an inept body unable, with respect to the District of Columbia, to effectively express its purpose or as an "Indian giver."

Any conclusion that in the District of Columbia the share of the surviving spouse otherwise qualifying for the marital deduction must be determined to be an "after-tax" share gives rise to a singular result squarely contrary to the stated purpose of the marital deduction provision and obviously contrary to the universally-recognized intent of Congress. Undoubtedly, under the Congressional power with respect to the District of Columbia, it was within the competency of the Congress to *expressly* provide for the District, absent a contrary testamentary provision, that property bequeathed, devised or passing (as in the case of intestacy) to the surviving spouse should be exonerated from any estate tax burden so long as the amount thereof did not exceed one-half of the adjusted gross estate. In light of the Congressional purpose to provide full tax equalization with the community property states, however, its failure to adopt a local apportionment statute gives rise to the clear and unmistakable implication that it

believed none to be required to effect its purpose for its District of Columbia citizens. Having made clear, however indirectly, what the policy of the District of Columbia law should be, that policy should be recognized and obeyed by the local courts. Taxpayer's Br. 31-32, and *United States v. Union Pacific Railroad Co.*, *supra*.

D.2. The Government Asserts That It Is the Province of the Congress Which Enacts the Statutes for the District of Columbia To Determine Whether It Should Be the Public Policy of the District That a Widow Who Elects Against the Will Should Receive Her Portion of the Decedent's Estate Free From Any Impact of the Federal Estate Tax. (Br. 22)

By this assertion, it is obviously the position of the Government that in the District of Columbia the question of apportionment may be resolved *only* by express and explicit Congressional legislation. The Government overlooks the fact, however, that under section 49-301 of the District of Columbia Code, the common law and principles of equity remain in force in the District except insofar as the same are inconsistent with or are replaced by legislation of the Congress.

Congress has clearly expressed *its* intent that unless otherwise prevented by the will of the testator or, otherwise on a national scale by a local *state* statute, one-half of a decedent's adjusted gross estate would be "allowed" to pass to the surviving spouse free of tax so as to equate common law jurisdictions with community property states. Congress having enacted no express legislation for the District of Columbia dealing with the apportionment of the federal estate tax, the question is whether the local courts in the application of "the common law and principles of equity,"* are prevented from effecting the clear and unquestioned Congressional purpose. It is submitted that

* Repeatedly (17 times) characterized by the Government as "judicial fiat" in an apparent attempt to attach thereto an opprobrious connotation.

application of the equitable rule of apportionment to free the surviving spouse's share of the estate from the burden of the tax is *wholly consistent with* the Congressional legislation and should be applied.

In support of its position that the rule of equitable apportionment can apply in the District of Columbia only by the adoption of specific Congressional legislation, the Government refers to a *minority* line of *state* court decisions,* the substance of which is that *in the states*, the question of whether or not a surviving spouse who elects against a will should be wholly relieved of the burden of the federal estate tax is a matter which should be left to state *legislative* determination. As noted in Taxpayer's brief (pp. 22-23), however, the cited decisions all appear to involve positions taken by state courts (prior to the enactment of the marital deduction provision) that under their descent and distribution statutes, the estate tax was deductible before determining any distributable amount. Their underlying rationale is that the state legislature having adopted legislation, the meaning of which had previously been established by state court decision, such meaning could not be changed by subsequent federal legislation dealing with the federal estate tax where the purpose of the Congress was to leave to each state the question of its impact. Indeed, the Supreme Court of North Carolina in *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 659, 73 S.E. 2d 877, 883 (1953), appears to take the position that even if Congress did not intend to leave this question to each state, it was necessarily required to so do. Thus, the Court stated that:

"The federal tax statute as amended which makes provision for marital deduction does not have the effect of controlling the *state statutes* as to the administration of decedent's estate. Power in this respect

* 9 as contrasted to 16 reaching the opposite result. See Taxpayer's Br. 21-22.

*has not been granted to the Federal Government, and the right of state control is reserved (10th Amendment) * * *.*" (Italics supplied.)

Predicated, as they essentially are, upon the inability of the Congress to change, by national legislation, the prior interpretation of an existing state legislative provision (Taxpayer's Br. 22-23), the rationale of these decisions is not applicable herein.

Under Article I, section 8, cl. 17, of the Constitution, Congress possesses, with respect to the District of Columbia, "not only every appropriate national power, but, in addition, all the powers of legislation which may be exercised by a state in dealing with its affairs, so long as other provisions of the Constitution are not infringed." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434-435 (1932). Further, every general statute of the United States not inapplicable in the District of Columbia and not inconsistent with, or replaced by, subsequent legislation of Congress applies in the District of Columbia with the same force and effect as elsewhere. Section 49-301, District of Columbia Code (1961 ed.), and see *Nuckols et al. v. United States*, 99 F. 2d 353, 354 (C.A. D.C. 1938).

Accordingly, pronouncements of decisions of *state* courts as to the necessity of a *state* legislature determining its local policy are wholly inapplicable to the District of Columbia.

Nor is *Weinberg v. Safe Deposit & Trust Co.*, 198 Md. 539, 549, 85 A. 2d 50, 54 (1951), authority for the broad and unlimited proposition for which (Br. 22) it is cited. *Weinberg* involved an election against the will in the situation where the then existing Maryland Apportionment Act, *antedating* the marital deduction provision, specifically provided that a spouse who renounces the will shall not benefit by the apportionment statute. This provision, said the Maryland Court, "is a general direction which clearly indicates the intention of the Legislature that the

estate tax shall be deducted before the widow gets her share." The statute expressly directing against apportionment on the facts involved, of course, could not be disregarded by the court. It is significant, however, (Taxpayer's Br., Appendix C, p. 21) that the Maryland Legislature subsequently provided for full exoneration of property passing to a surviving spouse to the extent that it qualifies for the marital deduction.

In this connection, the Government, in response to the contention that adoption of an apportionment rule "will further accomplish the desirable end of avoiding conflict in marital property rights with the neighboring States of Virginia and Maryland," asserts that such "is totally devoid of any merit" (Br. 24) since the "indisputable fact" is that those States "have obtained an apportionment rule for federal estate taxes only after many tortuous sessions in successive legislatures." While the latter is an "indisputable fact," the fact is *also* indisputable that in both States the share of the surviving spouse otherwise qualifying for the marital deduction, whether in the case of testacy or intestacy, is exonerated from the federal estate tax burden.

The Government also suggests (Br. 25) that the recommendation made in 1958 by the National Conference on Commissioners on Uniform State Laws that a Uniform Estate Apportionment Act be adopted by all the states is without significance and that only one state, North Dakota, up to 1967 has adopted that provision. This is not true. Of the ten states adopting apportionment legislation subsequent to 1958, four (New Hampshire, Oklahoma, Wyoming and North Dakota), not one, have adopted such provisions.

In final answer to this point, the Government asserts (Br. 25) that Congress "has steadfastly refused to adopt any statute for the District of Columbia which would apportion federal estate taxes in the same manner as have

the Maryland and Virginia statutes." This is without support in the record. To the knowledge of counsel for Taxpayer, there has never been presented to the Congress any proposed legislation dealing with the apportionment of the federal estate tax in the District of Columbia.

E. Here the Government (Br. 26-43) Relies Upon Amendments Made to the District of Columbia Descent and Distribution Statutes in 1957 and, in Particular, in 1961 as Evidencing "the Intention of Congress," in the Cases of Intestacy, That for Purposes of Computing the Estate Tax Liability of the Estate of the Decedent, the Share of the Surviving Spouse, Otherwise Qualifying for the Marital Deduction, Must Be Burdened With a Portion of the Federal Estate Tax.

Since the Government appears to rely primarily on the amendments made to the statutes "on September 14, 1961," it is evident that the Government concedes that *prior* to such amendments such was *not* the intention of the Congress from 1948 forward. The thrust of the Government's argument, therefore, may be summarized as follows:

(1) By the amendment to section 18-101 made in 1957 (*i.e.*, with the abolishment of common law dower), granting to the surviving spouse of an intestate decedent a share in his real estate, the statutory term "surplus" thereafter included both the real and personal property (Br. 27);

(2) That by the 1961 amendment to section 18-101 "expressly" (Br. 35) providing for the payment of debts, administration expenses and taxes out of the decedent's real property if there was a deficiency of personal property, the statutory term "surplus" was then changed to mean an amount determined after estate tax (Br. 34, 41); and

(3) That by the 1961 amendment adding subsection (e) to section 18-211 thereby limiting a spouse electing against the will to "one-half of the net estate bequeathed and devised by said will," it was the inten-

tion of Congress to limit such spouse to "one-half of the surplus of decedent's probate assets." (Br. 31)

Thereafter, overlooking the fact that said subsection (e) has application *only* to "limit," in the case of *testate* estates, the Government concludes (Br. 43):

"Hence it is respectfully submitted that the Congress in its *characterization* in Section 18-211(e) * * *, of the distributable portion of an *intestate's* probate estate as his 'net estate' intended that such distributable portion includes only the balance or *surplus* of the *intestate's* estate remaining after deduction therefrom * * * federal and District of Columbia estate taxes." (Italics supplied.)

In support of this asserted Congressional "intention," the Government relies upon certain local decisions dealing with the payment of "debts of the decedent" in arriving at the "surplus" or "net estate" and to certain state court decisions dealing with the same as well as with the payment of federal estate tax.

The Taxpayer submits that each of the foregoing conclusions is completely unfounded, from which it follows that the asserted intention of Congress is nonexistent.

As to (1) above, the Government states (Br. 27) it to be "incontrovertible" that as a result of the 1957 amendment to section 18-101 the term "surplus" in section 18-701 *et seq.* of the Code *then* applied not only to the decedent's personal estate but also to his real estate. The Government bases this conclusion upon quoted statements from H. Rept. No. 304 (Br. 27, first full paragraph) that either surviving spouse:

" * * * 'can take her or his full statutory share of the real or personal property of the deceased spouse' as provided in sections 18-701, 18-702, 18-703, and 18-704 of the District of Columbia Code (1951 ed.)." (Italics supplied.)

To the extent that the Government attempts to attribute the italicized language to H. Rept. No. 304, its statement is erroneous. To correct that statement, therefore, there must be inserted before the expression "18-701" in such italicized language the expression "18-101" which latter provision deals with the descent of real property. So corrected, the Government's "incontrovertible" assertion becomes disputatious.*

That by this amendment the previous meaning of the term "surplus" was *not* changed is obvious from the language of the statute itself. It is first to be noted, therefore, that under section 18-701 (the "surplus" provision), the statute deals with property to be "distributed" not to property which "descends." Accordingly, it deals only with personal property. Further, under section 18-101, dealing with the "course of descents generally," it is provided that the real estate of an intestate "shall descend" to those persons *who would take* "the surplus personal property" of the decedent. The statute, therefore, obviously distinguishes between real property and personal property and does not include the former in the "surplus" of the latter. This is made even more clear by the revision of the language of that section by the 1965 amendments referred to by the Government (Br. 29), since current section 19-301(a) reads substantially as follows:

"The real estate * * * if not devised, shall *descend* in fee simple, and the *surplus* of the *personal estate*, if not bequeathed, shall be *distributed* * * *. The heirs specified by this subsection shall take the real estate as tenants in common *in the same proportions as they take the surplus personal estate* * * *." (Italics supplied.)

It is submitted that *if* the 1957 amendment referred to is of any significance, the foregoing clearly establishes that

* "Section 18-101 [as thus amended] does *not* combine the realty with personalty in hodge podge fashion. * * * It merely provides for distribution of the realty (not the surplus of the realty)." Whalen & Graham, *Recent Changes in Decedents' Estates Law of the District of Columbia*, 24 Jnl. D.C. Bar Assn. 610, 616-617 (1957).

the real estate of an intestate decedent is *not* a part of the "surplus personal property," distribution of which is otherwise provided for in the statute.

As to (2) above, the Congress in 1961 further amended section 18-101 to insert the provision that:

" * * * Subject to right of dower, such real property shall be liable in the event of insufficiency of the personal property [available] for the payment of the intestate's funeral expenses, debts, costs of administration and estate, inheritance and succession taxes in the same manner and to the same extent as the personal property of such intestate."

The Government apparently conceives that by this amendment the Congress *changed* the local law as to subject the real estate of the decedent to the payment of debts, administration expenses and federal and District estate taxes, with the intended result that contrary to the 1948 marital deduction legislation, the share of the surviving spouse in the decedent's assets must bear an appropriate portion of the federal estate tax.

It has *always* been the law in the District of Columbia, however, that in the absence of sufficient personal property available therefor, all real estate could be resorted to for the payment of *debts* (sections 18-601, 18-607, 18-609 and 18-610) as well as *administration expenses* (*Pascucci et al. v. Hart*, 160 F. 2d 255, 256 (C.A. D.C. 1947)) and *estate taxes*. *Bigoness v. Anderson*, 106 F. Supp. 986 (D.C. D.C. 1952). This being the law only by inference from the cited sections, the Congress in 1961 amended section 18-101 to "expressly" provide this result. Thus, by the amendment, the Congress did no more than to state specifically that which was the general statutory and decisional law previously existing. Congress did *not* say that the share of the surviving spouse *must* bear a burden of any federal estate tax. The 1961 amendment referred to doing no more, in this respect, than to specifically restate

the existing law, no intention is to be attributed to the Congress to thereby affirmatively require that in determining the share of a surviving spouse, otherwise qualifying for the marital deduction, such must be burdened with any portion of the federal estate tax.

As to (3) above, dealing with the election against the will by the surviving spouse, the Congress, in 1961, expressly *limited* the share which he or she might thereby take in the *testate* estate:

“ . . . to [no] more than one-half of the net estate *bequeathed and devised by said will*. . . .” (Italics supplied.)

It is by this provision that the Government (Br. 31, 41) asserts that the Congress has “characterized” the distributable portion “of an *intestate*’s probate estate as his ‘net estate.’” It concludes that to determine the “net estate” referred to, taxes must first be set off.

Taxpayer submits that the attempt to “characterize” the surviving spouse’s share as “a distributable portion of the net estate” of an *intestate* is without support as is evidenced by the language of the statutory provision itself and the purpose of its enactment.

In the first place, subsection (e) of section 18-211 does not “characterize”; it merely “limits” a surviving spouse electing against the will of a *testate* decedent to no more than “one-half of the net estate *bequeathed and devised by said will*.” In H. Rept. No. 679, 87th Cong., 1st Sess., p. 4, the Committee on the District of Columbia stated that “there has been substantial criticism of the present law in that, on renunciation, the surviving spouse can, in the circumstances of no relatives closer than nephews and nieces, take the entire estate of the deceased spouse and thus wholly defeat the testator’s intentions.” Accordingly, it merely provided “a limitation on the share the

surviving spouse filing a renunciation can receive *in derogation of the will.*" (Italics supplied.) Contrary to the assertion of the Government, the term "net estate bequeathed and devised by said will" means neither the "net probate estate" nor the "net estate." Thus, if H dies testate as to \$100,000 but intestate as to \$200,000—leaving a surviving spouse but no other relatives closer than nephews and nieces—and the surviving spouse elects against the will—she is entitled to *all* of the intestate assets, whether realty or personalty (sections 18-101 and 18-702, District of Columbia Code (1961 ed.)) and, *in addition*, under section 18-211(e), to one-half "of the net estate bequeathed and devised by said will." See 1 Mersch, *Probate Court Practice in the District of Columbia* (2nd ed.) (1966 Pocket Part) at pp. 54-55.

On the basis of the foregoing, it is submitted that the Government errs (Br. 43) in asserting that the Congress "in its characterization in Section 18-211(e) * * *, of the distributable portion of an intestate's probate estate as his 'net estate' intended that such distributable portion includes" only the surplus of the intestate's estate after deducting therefrom federal and District of Columbia estate taxes. Predicated upon the foregoing, it is respectfully submitted that the Congress neither in 1957 nor in 1961 intended to affirmatively provide that the share of a surviving spouse of a District of Columbia intestate, otherwise qualifying for the marital deduction, should be burdened with any portion of the federal estate tax—for which reason the intention of local state legislatures, relied upon in the decisions cited by the Government, are of no consequence.

F. 1. The Government Asserts (Br. 43-44) to be "Devoid of Any Merit" the Taxpayer's Contention That the Congress, in Enacting the Marital Deduction Provisions in 1948, "Implicitly Expected" the District of Columbia Courts to Adopt a Rule of Apportionment Exonerating the Share of the Surviving Spouse From the Estate Tax.

Continuing in its effort to argue this proceeding as if it were one involving a *state* problem, the Government (1) notes that there is no "specific provision of section 2056" of the Code evidencing any intent to modify the application of the descent and distribution statutes of a *state* (Br. 43-44), (2) asserts that the Senate Report accompanying the bill discloses "that the *state* statutes of descent and distribution should in nowise be modified" (Br. 44), and (3) points to *state* court decisions (Br. 44-46) that by the marital deduction provision the Congress did not in anywise intend that *state* courts be required to modify the application of *their* respective local descent and distribution statutes. With this the Taxpayer can have no argument. Whether Congress is possessed of power, with respect to the state descent and distribution statutes, to provide where the burden of the federal estate tax shall fall (see discussion in *Wachovia Bank & Trust Co. v. Green* (Br. 44)) is immaterial since, *as to the states*, it is clear that Congress intended to leave to *them* the question of what portion of a decedent's estate should bear the burden of the tax.

Contrasted to the Government's position herein, however, we are *not* dealing with a *state* problem. We are dealing with one under the law of the District of Columbia where the intention of Congress as to what that law shall be is of exclusive significance. The Congressional purpose was to permit a transfer of up to one-half of non-community property to a surviving spouse "free of the estate tax." While as to the states, such was a "permissive" grant depending upon their local law; it is clear that in the District of Columbia the Congress intended to *require* that result in case of intestacy.

F. 2. Here the Government Asserts (Br. 46-48) That Section 2056(b)(4) of the 1954 Code Disclaims Any Intention on the Part of Congress That the One-Third of the Surplus of Decedent's Assets Which the Surviving Spouse Is Entitled To Receive Under the District of Columbia Code Should Escape Any Impact of Any Federal Estate Tax.

In support of this proposition, the Government cites *Campbell v. Lloyd*, 162 Ohio St. 203, 206, 122 N.E. 695, 697 (1954) for the proposition that by this provision "Congress *disclaimed* any intent that the marital deduction should *not* be burdened by the estate tax." For the same proposition, other *state* court decisions are cited.

Taxpayer admits the substance of this position in any situation *outside* the District of Columbia. In its attempt to achieve national uniformity in impact of the federal estate tax, the Congress, dealing with the testator before his death, said to him: "If in your will you leave to your surviving spouse up to 50% of your adjusted gross estate and specifically provide that such is not to be burdened by the federal estate tax, we will permit you to pass to such surviving spouse such one-half free of any estate tax so as to put you on a parity with your counterpart in a community property state." Where no estate tax provision was made in the will or where the decedent died intestate, the Congress said to the states: "If you, by legislation or judicial decision, see fit not to burden the share of the surviving spouse (to the extent it does not exceed 50% of the adjusted gross estate) with any part of the federal estate tax, we will place your decedent in the *same* favorable estate tax position as his counterpart in a community property state."

By section 2056(b)(4), Congress *merely recognized* that in the common law *states* the quantum of property passing to the surviving spouse necessarily depended on whether, under *state* law, such share was burdened with a portion of the tax *and provided* that *if it were* so burdened, the amount of the marital deduction should be appropriately

reduced. Thus, while Congress thereby disclaimed any intention that the amount of the marital deduction must *not* be burdened by the estate tax, it also did not say that it *should* be so burdened. Further, it is reasonable to assume that Congress expected each common law jurisdiction to exonerate the marital deduction portion from any tax burden in order that the estates of its local decedents could be placed upon an estate tax parity with community property states. In light of the unquestioned Congressional purpose to provide estate tax equality between common law and community property states, it is inconceivable that with respect to the District of Columbia, Congress intended a result contrary to its attempted and intended full and complete tax equalization. To hold otherwise is to attribute to the Congress a desire for inequality among taxpayers contrary to the principle enunciated in *Colgate-Palmolive-Peet v. United States*, 320 U.S. 422, 425 (1943).

F. 3. The Government Asserts (Br. 48) as "Devoid of Merit" and Contrary to the "Ratio Decidendi" of the Supreme Court in *Y.M.C.A. v. Davis* Its Statement of the Alleged Position of the Taxpayer, to Wit, that Congress, With the Enactment of the Marital Deduction Provision, "Expressly Provided" That the Surviving Spouse Should Take Her Statutory Share Free of Any Estate Tax "Merely Because" Her Distributable Share Under "State Statute" Qualifies for the Marital Deduction.

It is again evident that the Government would argue its case as though a law of a *state* were involved rather than the law of the District of Columbia.

Taxpayer's position *properly stated* is that although the Congress, in enacting the marital deduction provision, left to each of the several states the question of whether, in application, each would *permit* the full benefit intended, also clearly and unmistakably intended, for the District of Columbia—for which it also legislates locally—that such share *would* pass free of any such tax.

So viewed, Taxpayer's contention in no way contravenes the rationale of the Supreme Court in *Y.M.C.A. v. Davis*. The basis of the Court's decision there was that since local law was controlling as to whether a charitable bequest should bear a share of the federal estate tax burden—Congress not having otherwise provided—the local law, as enunciated by the Supreme Court of the State of Ohio, was controlling. As to the marital deduction allowance—the Congress not having otherwise provided *for any state*—the Ohio law is likewise controlling. As to the District of Columbia, however, it is the will of Congress which must be respected and applied rather than the will of any one of the several states. Since it was the unmistakable purpose of the Congress in enacting the marital deduction provision to provide, subject *only* to the right of the several states to defeat that purpose—that one-half of the property of a decedent could pass to the surviving spouse free of tax in the common law jurisdictions—it did not leave to the District of Columbia courts any right to provide otherwise.

G. In This Section of Its Brief, the Government Asserts (Br. 52) That the Decision of the Local District Court in *In re Estate of Collins*, 269 F. Supp. 633 (1967) Is Erroneous "and Should Not Be Followed."

Collins involved the estate of an intestate. In holding that the share of the surviving spouse therein *should* be exonerated from any federal estate tax burden, the Court (pp. 633-634) stated as follows:

"It is agreed that the ultimate impact of the tax is to be determined by local law. There is no express provision of the District of Columbia Code directing how the Federal Estate tax is to be charged. * * *

"In resolving this question, absent specific local law, the court is of the opinion that controlling consideration should be given to effectuating the intention of Congress in enacting the section of the Internal Revenue Code which allows a marital deduction."

In support of its position that *Collins* should not be followed, the Government asserts the following:

(1) That in *Collins* no consideration was given to section 19-301, District of Columbia Code (1961 ed., Supp. V), which it, the Government, asserts provides "that before arriving at the surplus personal estate of the intestate, estate taxes shall be deducted" (Br. 53);

(2) That the full impact of *Herson v. Mills* was not presented to the Court (Br. 53);

(3) That the quotation in *Collins* from *Northeastern Pennsylvania National Bank & Trust Company v. United States* "does not support the contention of Taxpayer that the Congress had enacted the marital deduction provisions for the benefit of the surviving spouse" (Br. 54) and that the intent imputed to the Congress in *Collins* "by its quotation from *Pitts v. Hamrick* * * * is unsupportable" (Br. 55); and

(4) That Congress, in its role as the legislative body for the District of Columbia, has made no attempt with respect to the District of Columbia "to create the 'equalization' " which "the marital deduction *had made possible* for the District."

As to (1) and (2) above, it is true that in the *Collins* decision no reference is made to section 19-301, *supra*, or to *Herson v. Mills*. This, however, does not mean that the Court's attention was not directed thereto and the same argument there made as is here made by the Government. In the "Memorandum in Opposition to Administrator's Petition for Instructions" in that case, the following is set forth:

"The District of Columbia statute of descent and distribution and relevant case law would refute the administrator's position. Title 19-301 of the District of Columbia Code provides, *inter alia*:

* * *

"The above statute refers to the distribution of the 'surplus' of the personal estate of the decedent . . . [which is *after tax*]."

Also following this is a lengthy discussion of *Herson v. Mills* as well as decisions of state courts, also cited herein by the Government, holding that in the absence of *state* legislation, the share of the surviving spouse must bear a part of the tax burden.

As to (3) above, the Government asserts that the purpose of Congress was merely "to equalize the incidence of the estate tax" but not, in connection therewith, "to maximize the quantum" of the assets receivable by a surviving spouse under *state* law (Br. 54).

Keeping in mind that we are dealing *not* with a *state* but with the District of Columbia, the Government in no way points out how "equalization of the incidence of the estate tax" or the Congressional purpose to allow transfer of up to one-half of noncommunity property to the surviving spouse *free of the estate tax* is to be effected *without* maximizing the quantum of the share of the surviving spouse in the District of Columbia. Since, under *North-eastern Pennsylvania National Bank & Trust Company v. United States, supra*, resolution of the question of whether the surviving spouse of a District of Columbia decedent is to be burdened with a portion of the federal estate tax is either "essentially" or "exclusively" a matter of "discovering the intent of Congress"—and that intent being clear—it can be effected *only* by maximization of the wife's share as herein contended for.

As to (4) above, the Government, continuing its attempt to equate the problem here presented with a "state" problem, asserts (Br. 59) "that Congress intended that the *state* law should determine the ultimate thrust of the tax." It continues with the semantological assertion that "the Congress, in its role as the legislative body for the

District of Columbia, has made no attempt to provide the equalization which * * * [it by] the marital deduction *had made possible* for the District."

The Government neither can nor does deny the intent of Congress in enacting the marital deduction provision as being to *establish* (other than as might result from application of local *state* law) a national system of federal estate taxation which would create uniformity in the estate tax impact between common law and community property jurisdictions. It reasons, however, that the Congressional intent was ineffective as to the District of Columbia because Congress failed to take some *further* and *necessary* local step to make such effective as to this jurisdiction.*

In support of this position, the Government *again* cites various *state* decisions, the effect (Br. 44) of which is that the "federal tax statute as amended which makes provision for marital deduction does not have the effect of controlling the *state* statutes as to the administration of decedent's estate" and that "power in this respect has not been granted to the Federal Government, and the right of *state* control is reserved (10th Amendment)" as stated in *Wachovia Bank & Trust Co. v. Green*. In this position, the Government, equating *this* action with one involving an intestate domiciled in one of the several *states*, overlooks the fact that it is Congress itself which legislates for this jurisdiction.

Thus, as stated by the Court in *Collins*, "controlling consideration" should be given to effectuating the intention of Congress in enacting the section of the Internal Revenue Code which allows the marital deduction. Any other result for the *District of Columbia* is to relegate estates of

* The position of the Government may be characterized, by paraphrasing what Lord Mildew said in *Bluff v. Father Gray* (Herbert, Uncommon Law, 192), that "If Congress, as to the District of Columbia, means what it says, it must say so."

local decedents to a position inferior to that *made possible* for each other common law jurisdiction and to assert that the unmistakable Congressional intention is impossible of being effectuated in the District without further and additional Congressional legislation.

SUMMATION

The issue involved herein, *i.e.*, whether the share of a surviving spouse of a District of Columbia decedent, otherwise qualifying for the marital deduction, is to be burdened by any portion of the federal estate tax liability resolves itself into the corollary issue as to whether, in the District of Columbia, the purpose and intent of Congress to allow transfers to the surviving spouse "free of the estate tax" is to be fully or only partially effected. It is to be noted that without the marital deduction, the federal estate tax herein (JA 23) would amount to \$2,932,752.83; that with the marital deduction claimed by Taxpayer (*i.e.*, the spouse's share bearing no part of the tax burden), the tax would be reduced to \$1,921,418.17 (thus providing for *full* equalization); and that under the Government's theory that the wife must bear a part of the tax burden, the reduction would be only to \$2,354,321.60 (the result being to only *partially* effect the Congressional intent).

Resolution of the question here presented being a matter of discovering the intent of Congress, Taxpayer submits that its solution may be effected by answering the following questions as to the Congressional intent *with respect to District of Columbia decedents*, in absence of a testamentary direction to the contrary:

- (1) Did Congress intend in 1948 to provide for full equalization of the estate tax burden with community property jurisdictions by allowing up to one-half of the decedent's gross estate to pass to the surviving spouse tax free?

(2) If so, did Congress, by failure to adopt for the District an appropriate tax apportionment statute, intend that its purpose be defeated?

(3) Having achieved its intended purpose in 1948, was it the intent of Congress to destroy the provided equalization through amendments made in 1957 and/or 1961 to the District of Columbia Code?

Respectfully submitted,

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